Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

QUINN-L CAPITAL CORPORATION, *et al.*,

Petitioners,

vs.

ROYAL INSURANCE COMPANY OF AMERICA AND ROYAL LLOYDS OF TEXAS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

SAMUEL L. BOYD, P.C.
Counsel of Record
BOYD & ASSOCIATES
Attorneys for Petitioners
One Galleria Tower, 21st Fl.
13355 Noel Road, L.B. 87
Dallas, Texas 75240-6602
(972) 726-0204

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. The Fifth Circuit Court of Appeals has decided an important federal question in a way that is so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, *to wit*:

A. Did the United States District Court for the Northern District of Texas – Dallas Division (district court) have discretion to deny, for any reason, the Fed.R.Civ.P. 60b(5) motions filed by two (2) members of an unincorporated association comprised of 157 investors when that district court never had, in the first instance, federal subject matter jurisdiction by which to have permanently enjoined the unincorporated association from pursuing its state court damages actions for post-federal judgment torts, because:

(1) Contradicting the mandate set forth by *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980), the real party to the controversy, the unincorporated association, which solely owned the challenged rights, was never sued;

(2) Contradicting the mandate set forth by *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990), the district court failed to determine diversity jurisdiction by considering the citizenship of each of the 157 defendant unincorporated association members, including those who were non-diverse to the plaintiffs below;

QUESTIONS PRESENTED – Continued

(3) As the unincorporated association, the real party to the controversy, possessed members who were non-diverse to the plaintiffs below, the federal court never possessed federal diversity jurisdiction under 28 U.S.C. § 1332; and

(4) There was no other basis for federal jurisdiction, because in *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1541 (1994), the Fifth Circuit Court of Appeals held that the district court was without ancillary, the court's alternative jurisdictional claim, jurisdiction under 28 U.S.C. § 2283 over the post-federal judgment torts for which the unincorporated association's members had subsequently sued in Texas state courts?

B. Did the federal district court thus have any discretion to continue a permanent injunction against the unincorporated association's pursuit of post-federal judgment Texas state court actions when it had never possessed federal subject matter jurisdiction to have entered said injunction, in the first instance?

2. If the district court had no such discretion, did the Fifth Circuit Court of Appeals permissibly ignore the dictates of *Navarro Sav. Ass'n* and *Carden* by disregarding the absence of subject matter jurisdiction of a district

QUESTIONS PRESENTED – Continued

court which, in the first place, had never possessed subject matter jurisdiction, as the real party to the controversy, constituted by members who were non-diverse to the plaintiffs below?

PARTIES TO THE PROCEEDING

The following are parties to this proceeding:

1. Petitioners: Mike Allen Adkisson, W.O. Akin, Gary R. Albertson, Jose L. Aliseda, Jerry H. Anderson, Lewis C. Barbe, Eileen Barbe, William J. Barrett, Jerome B. Bart, Bobby L. Bates, Steven J. Blackwell, E. William Boddeker, III, Mrs. William Boddeker, David G. Borman, Bowen Investments, Bronwyn Bowen, Bettie Bowen, William A. Bradley, Carla Nan Brooks Trust, Peter Brugger, Elena Brugger, Joseph E. Bruno, George T. Bryan, Charles B. Caldwell, Jr., J. Larry Caldwell, Mark N. Carraci, James Carrigan, Gloria Carrigan, George P. Catsulis, Jill E. Clarridge, Arthur Cobb, Paula Cobb, John J. Costanzi, Charles V. Court, Jr., Buford G. Crowley, Michael A. Cummins, Kenneth D. Cushman, Charles W. Daeschner, Jr., Elmer V. Dahl, Loyd F. Dale, D. William Davison, Keith D. Delatte, Jean Delatte, Marvin J. Descant, Warren F. Dodge, Edward L. Domingue, Grant A. Dove, William Dowhan, Alden W. Dudley, Jr., Donald G. Edgerton, Bobby Jack Estes, Charles J. Fagan, Elva Falkenberg, Roy M. Fleniken, M. Wayne Flye, Emil F. Frey, Jose A. Fuentes, Perry L. Fulcher, Nick Funston, Jack W. Gamble, W. Gerald Gaudet, John W. Goodman, Nancy J. Gribble, William J. Gribble, Dean O. Griffith, Jack L. Grindle, Edward B. Gripon, Richard S. C. Grisham, V. Bruce Hampton, Joseph S. Heard, Jorge Y. Herszage, Ross H. Hicks, O. Bryan Holland, Rodney Holley, Dianne Holley, Robert W. Hood, Michael J. Howell, Ted Huang, Richard W. Huye, Bonner H. Jackson, Edward E. Jacobson, Charles B. Joachim, F. Allen Johnston, Peter H. Jones, Andrew B. Jordan, Jr.,

PARTIES TO THE PROCEEDING – Continued

Mrs. Eugene "Carla" Karasewich, Richard L. Landry, H. Lee Leonard, Stephen C. Lesauvage, Edward E. Louis, Kenneth M. Lubritz, Milton H. Madeley, Jr., David V. Mariast, Mark D. Marshall, William H. Marshall, Jerald R. Martin, Daniel r. Martiny, Maxwell Lumber Company, Stephen E. McElmurry, G. Walter McReynolds, Curtis C. Miller, Morris R. Mitchell, Charles F. Moseley, George W. Moss, III, Sidney Louis Mouk, Stephen J. Murdoch, Wilbur Gene Murff, Edgar P. Nace, Kenwyn G. Nelson, Norman P. Neureiter, John C. O'Brien, Jr., Michael G. Page, Mark A. Palmer, Otto A. Papp, Loree Papp, Charles D. Peterson, Jr., Jack W. Pou, Gerald F. Powell, Michael A. Ramsay, Lorianne M. Reeves, Terry G. Rehn, Douglas H. Riddell, Newman L. Riechman, Nadine Reichman, J.B. Rochelle, III, Dan Salisbury, William c. Sandland, Jerome F. Scego, Jackie Scego, Russell W. Schroeder, Gail S. Schwinger, Cecil R. Simmons, William M. Simmons, A.O. Singleton, III, David A. Sirbasku, Donna M. Sirbasku, Mary Kay Smedstad, Thomas M. Smith, Simon Sonik, R. Malcolm Steward, Theodore B. Stubbs, James W. Swinnea, Jr., Antoinette C. Swinnea, Leonard E. Swischuk, James R. Tarrant, Sr., George E. Thomas, James C. Thompson, Jack A. Thurmond, Louis D. Tilotta, James L. Tucker, John A. Van de Wiele, James T. Walker, Joseph B. Walker, Paul A. Weber, Kurt G. Weiss, Craig Weisinger, Larry M. Wolford and Roger B. Yandell (individually, the "investors")(collectively, the "unincorporated association"). Quinn-L Capital Corp., Quinn-L Equities, Inc., Quinn-L Financial Corp., Quinn-L Management Corp. and Quinn-L Mortgage Co. (collectively, "Quinn-L," the

PARTIES TO THE PROCEEDING – Continued

assignors of the post-judgment torts to the unincorporated association).

2. **Respondents:** Royal Insurance Company of America and Royal-Lloyds of Texas (collectively, "Royal").

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The ruling entered by the Fifth Circuit Court of Appeals which affirmed the district court's denial of Petitioners' Fed.R.Civ.P. 60b(5) motions was not published. A copy thereof appears in the Appendix hereto. The district court's denial of Petitioners' Rule 60(b)(5) motions was, likewise, not published. A copy thereof also appears in the Appendix hereto. (App. A & B).

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals' ruling was entered on December 30, 1996, and the petition for certiorari was filed within ninety (90) days of that date.[1] By an April 2, 1997 letter, Petitioners received notice from the Clerk of the Supreme Court of the United States that they had sixty (60) days from the April 2nd date within which to redo and re-file said petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rule 13 of the Rules of the United States Supreme Court. As well, the Court may review subject matter jurisdiction *sua sponte*.

[1] The 90th day fell on March 30, 1997, or on Sunday. Therefore, Petitioners had up to and including April 1, 1997, within which to file their petition.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS CITED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

28 U.S.C. § 1332 provides in pertinent part:

> The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –
>
> (1) Citizens of different states . . .

28 U.S.C. § 2283 provides in pertinent part:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Fed.R.Civ.P. 60b(5) provides:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application.

STATEMENT OF THE CASE

A. Basis for Fifth Circuit Court of Appeals' Jurisdiction

Petitioners' appeal to the Fifth Circuit Court of Appeals was from the district court's denial of the Fed.R.Civ.P. 60b(5) motions filed by two (2) of 157 associated members, Professional Investor Partnership II (PIP Partners) and Paula M. Albertson (Albertson), on behalf of themselves and the entire unincorporated association of investors; all of whom jointly owned claims assigned under Texas law by Quinn-L against Royal. The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291. (App. D, p. 1).

B. Pertinent Background Facts

1. The consolidated federal investor action

Beginning in May 1987, some 157 investors filed 26 separate suits in the district court. They sought damages suffered due to their failed investments in various real estate ventures promoted or managed by Quinn-L.[2] Royal defended Quinn-L in the federal suits. The district court consolidated the 26 federal actions against Quinn-L. (R. "A-3" Exs. 1-21, 23, 25-26, "A-5" Ex. 6, p.2) (App. D, p. 4).

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[2] The out-of-pocket damages for those 157 petitioners represented by counsel herein, was over $16 million. The total investor damages approximated over $32 million.

2. *Royal I*

On 10 May 1988, Royal filed its first federal declaratory judgment action (*Royal I*) to establish its duty or not to defend or indemnify Quinn-L against the investors' claims. The same district court presided over the 26 damages cases and *Royal I*. (R. "A-3" Ex. 27, p. 3) (App. D, p. 4).

In *Royal I*, Royal failed to join the investors who were suing Quinn-L. On two (2) separate occasions, the investors sought to directly participate in *Royal I*. The district court denied both attempts. Thus, the investors never had the opportunity to litigate the coverage issue in *Royal I*. (SJ Exs. "3-KK, LL") (App. D, p. 4).

On December 12, 1988, Royal moved for summary judgment, claiming no duty to: (a) defend Quinn-L in the various federal investor suits; and (b) cover or indemnify under the policies for any losses which arose from those claims. Quinn-L asserted that the investors sought to recover damages for mental anguish claims covered by Royal's policies. On April 14, 1989, the district court granted Royal's partial summary judgment motion. On September 8, 1989, it entered a final declaratory judgment in *Royal I*. (R. "A-5" Ex. 1, pp. 5-6 & Ex. 8, "A-6" Exs. 6, 24, p.9) (App. D, pp. 4-5).

3. The consolidated federal investor action's dismissal

In 1989, the investors and Quinn-L tentatively proposed a settlement calling for: (a) a judgment against Quinn-L in the federal liability suit which awarded the investors, respectively, a cumulative sum of $32.5 million;

and (b) Quinn-L to assign its claims against Royal and others to the investors. Royal authorized Quinn-L to settle, but later withdrew its approval. In response, Quinn-L did not consummate the proposed settlement. (R. "A-5" Exs. 33-36, "A-7" Exs. 48, 53, "A-11" Ex. 161) (App. D, p. 5). Royal had urged that under the complaint allegation rule, it had no previous notice of any mental anguish or other personal injury claims.

On August 3, 1989, the investors therefore moved to dismiss: (a) with prejudice, their federal claims against Quinn-L; and (b) without prejudice to their state law claims. The district court entered an order to that effect on August 28, 1989. (R. "A-5" Exs. 1, 3, 29, 30, "A-11" Ex. 166) (App. D, p. 5).

4. The *Atkinson* action in the Dallas County state court

On September 13, 1989, the investors sued Quinn-L in Dallas County based entirely upon Texas law (*Atkinson*). For the first time, they pleaded mental anguish caused by Quinn-L's negligence. Quinn-L forwarded the suit papers to Royal, demanding coverage and a defense. Royal offered to qualifiedly defend Quinn-L and advised (should Quinn-L have accepted) it to contact Royal to discuss choosing defense counsel. (R. "A-5" Ex. 18, p. 21, Exs. 39, 43, pp. 3-4) (App. D, pp. 5-6).

On that same day, but without notice to Quinn-L, Royal assumed the defense by hiring C. Randall Johnston (Johnston) and instructing him to immediately answer. At that time, no Quinn-L entity had been properly served and no answer was due. Johnston, waiving service

defects and jurisdictional challenges, filed a general denial on November 17, 1989. (R. "A-7" Ex. 62, "C-7," pp. 31-32; R. Vol. 12 Ex. "B," p. 6) (App. D, p. 6).

On January 9, 1990, Quinn-L formally rejected Royal's qualified defense. Johnston, without Quinn-L's authority or approval, remained its defense counsel for another five (5) months. During this period, he engaged in conduct which the Texas state court ultimately found sanctionable; thus deeming admitted Petitioners' all-encompassing admissions requests against Quinn-L. (R. "A-5" Exs. 39, 43, p. 3-4, 45, 48, "A-7" Exs. 62, 69, "A-8" Exs. 79, 89, "A-11" Ex. 152, "C-7," pp. 31-32, 73, 146-47, "K-7" Ex. 4; R. Vol. 12 Ex. "B," pp. 6 & 10, "B-8" Ex. 48, Ex. "B-10," p. 7; R. 1275-76) (App. D, pp. 6-7).[3]

On August 6, 1990, pursuant to its March 29th notice to all counsel (including Johnston), the state court called *Atkinson* to trial. Johnston did not appear, although Royal representatives, without participating, attended the trial. On August 7, 1990, after receiving evidence in a trial on the merits, the state court ruled in the investors' favor against Quinn-L based upon the deemed admissions and its own exemplary damages' determination which resulted in a cumulative judgment of approximately $741 million. (R. "A-8" Ex. 90; "A-9" Ex. 106, pp. 6-8) (App. D, pp. 7-8). Subject to the judgment becoming final, the investors thus became Quinn-L's judgment creditors on August 7th.

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[3] Johnston also inserted himself into coverage issues; *e.g.*, he wrote Royal and offered his services to "protect the interests of the company;" expressing concern to Royal that his steps on Quinn-L's behalf might prove adverse to Royal. (R. "A-5" Ex. 49, "C-7," pp. 73-146; R. 1275-76) (App. D, p. 7).

5. Quinn-L's assignment to the investors (jointly)

On September 4, 1990, two (2) days before *Atkinson's* judgment became final, Quinn-L assigned its rights against Royal and others to the investors, jointly. No investor, individually, received or held any of the assigned rights. Rather, each possessed derivative, jointly-held rights, only. Thus, only the unincorporated association of the investor group owned Quinn-L's assigned rights against Royal. By its terms, the written assignment embodied the unincorporated association's very existence, because it: (a) recognized each and every investor as a joint assignee[4] and judgment creditor; and (b) set forth that its sole purpose was to enable the 157 investors to jointly prosecute Quinn-L's tort claims against Royal and collect damages caused by Royal in *Atkinson*.[5] The individual investors were also Quinn-L's third-party beneficiaries under the Royal policies. (App'ts Rec. Excerpts "F" Ex. 3-A, "J" Ex. A, "O" Ex. 2-B, p. 20, "Q" Ex. A & "R"; R. 3580, 3584-86, 3672-84, 3776-85 [vol. 16]; R. "A-6" Ex. 4) (App. D, pp. 8, 11-17, 18-26; F, pp. 3-5 & G).

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[4] "Jointly" is defined as, " . . . shared by or common to two or more," " . . . sharing with another or others," and " . . . formed or characterized by cooperation or united action." *See The American Heritage Dictionary of the English Language*, 706 (10th ed. 1981).

[5] In this regard, Royal has never presented any controverting evidence that the unincorporated association did not, in fact, exist. (App. F, pp. 5-6 & n.6).

6. The Cameron County state court actions

As both joint assignees and individual judgment creditors, the associated investors filed a state court damages action in Cameron County, Texas, against Royal and others on September 4, 1990. As joint-assignees, they sought damages caused by Royal's post-federal declaratory tortious conduct with respect to the *Atkinson* "defense" and indemnity under the policies. As judgment creditors, the individual investors sought the third-party insurance benefits under the Royal policies. On September 17, 1990, the associated investors filed a declaratory judgment action in Cameron County that Royal was directly liable (first-party) to them for the *Atkinson* judgment, because: (a) as the damages awarded them in *Atkinson* were for injuries covered by the relevant Quinn-L/Royal policies, Royal should have offered Quinn-L an unqualified defense and coverage; and (b) Royal had waived its right to, or was estopped from, denying coverage under the policies due to its conduct towards Quinn-L in *Atkinson*. (R. "A-5" Exs. 20-21) (App. D, pp. 8-9).

7. The *Johnston* Dallas County state court action

As Quinn-L's assignees, the unincorporated association of investors also filed *Quinn-L Capital Corp., et al. v. Johnston, et al.*, cause no. 91-13811-A, in the 14th Judicial District Court of Dallas County, Texas, on November 15, 1991 (*Johnston*). Their claims arose from Johnston's sanctioned conduct in *Atkinson*. On April 10, 1996, despite the investors then-pending federal appeal, the Texas state court dismissed with prejudice the enjoined investors'

claims against Johnston, solely because the district court had denied the Fed.R.Civ.P. 60b(5) motions. (App. C & D, pp. 16, 40).

8. *Royal II*

The district court had refused Royal's request to reopen *Royal I* to review new coverage issues arising from the *Atkinson* pleadings, instead referring Royal to the Texas state courts for declaratory relief. On March 9, 1990, Royal instead filed a wholly new federal declaratory judgment action that the policies did not obligate it to defend or indemnify Quinn-L in *Atkinson*. In *Royal II*, Royal pleaded federal jurisdiction on the post-federal declaratory judgment over parties and claims based upon: (a) complete diversity; and (b) ancillary jurisdiction. As well, Royal neither sought enforcement of the first declaratory judgment, nor pleaded *res judicata/collateral estoppel*. (R. 001) (App. D, p. 9 & F, p. 1 n.2).

On August 15, 1990, Quinn-L filed its answer in *Royal II*. On September 27, 1990 (after Quinn-L had assigned its claims), Royal filed a supplemental petition under Fed.R.Civ.P. 15(d) whereby, for the first time, it: (a) attempted to join all the investors[6] to *Royal II* on the basis

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[6] In reality, however, Royal had: (a) failed to sue association investor William J. Gribble; instead, suing the nonexistent entity, "William J. Gribble Trust;" and (b) named, but never served, various other unincorporated association members such as Albertson. (App'ts Rec. Excerpts "J" Ex. C, p. 13 & Appendix A, p.1, Ex. D; R. 444, 3697, 3700, 3714-15 [vol. 16]) (App. D, p. 12).

that each of the 157 had become Quinn-L judgment creditors;[7] and (b) radically altered the nature of its original action against only Quinn-L to enforce *Royal I*. Specifically, for the first time via its supplemental petition, Royal requested that: (a) there was no duty to indemnify Quinn-L and no liability to Quinn-L or the associated investors for *Atkinson's* judgment; (b) as losses adjudged against Quinn-L in favor of the associated investors in *Atkinson* were, allegedly, not for occurrences covered under the relevant policies, Royal had no duty to indemnify Quinn-L and no liability to the investors for *Atkinson's* judgment; (c) as Quinn-L had allegedly failed to cooperate or provide a reasonable defense to the investors' claims asserted in *Atkinson*, Royal had no duty to Quinn-L or the investors; (d) as the *Atkinson* judgment was allegedly the result of collusion between Quinn-L and the investors[8], Royal had no obligation to either; and (e) should the federal court have found Royal to have possessed any such obligations to Quinn-L and the investors, then that duty would not have been determined by *Atkinson's* judgment, but, instead, Royal would have secured a declaration of the extent of any coverage or indemnity obligation from the federal court. (R. Vol. 10;

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[7] In September 1990, the Petitioners had provided Royal with the written assignment, as well as an associated investor's affidavit which specifically disclosed that PIP Partners (a non-diverse association member) was, by the written assignment, an assignee, jointly, with all the other investor-plaintiffs in *Atkinson* of the universe of Quinn-L's post-declaratory judgment torts of Royal and others. (App. D, 12-13 & F, pp. 3-6); ***see also infra*** at 7 for citations to record.

[8] The judgment, however, had resulted only as a result of the court-sanctioned conduct of defense counsel appointed by Royal in *Atkinson*.

"A-5" Ex. 16, pp. 2, 4-5; App'ts Rec. Excerpts II "T," "U," "V," "W," "X" & p. 11; R. "A-8" Ex. 95, "A-9" Ex. 100, "K-4" Ex. 1) (App. D, p. 9 & F, pp. 19-21).

Thereafter, realizing that the citizenship of the association member, PIP Partners, destroyed diversity, Royal quickly dismissed it from *Royal II* on September 28, 1990. By so-doing, Royal did not maintain suit against the real party to the controversy (unincorporated association), the sole owner of the post-federal judgment claims which it sought to litigate in *Royal II*. (App'ts Rec. Excerpts II "V," pp. 1-3, "W" Ex. A, "Y"; R. "A-9" Ex. 100) (App. D, pp. 9-10 & F, pp. 8-10).[9]

Royal then sought a temporary restraining order (TRO) to prevent the associated investors from prosecuting their state court actions. On October 31, 1990, the district court temporarily enjoined Quinn-L, the associated investors and everyone in privity with them, from attempting to impose liability on Royal in any forum based upon *Atkinson's* judgment. Coincidentally, the Cameron County state district court had been poised, the next day, to decide the associated investors' state court summary judgment which might have been dispositive of the liability case. (R. 929, 2889) (App. D, p. 9 & F, pp. 15-21).

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[9] PIP Partners and the never-served unincorporated association members (*e.g.*, Albertson) did not answer Royal's complaint. Thus, the unincorporated association of investors, PIP Partners, Albertson and other partners, were never parties to *Royal II*. (App'ts Rec. Excerpts "J" Ex. C, p. 13 & Appendix A, p. 1; R. 444, 3697, 3712, 3714-15 [vol. 16]) (App. D, pp. 12-13 & F, pp. 3-6).

The district court issued a preliminary injunction in Royal's favor on November 30, 1990, ruling that the "relitigation exception" to the Anti-Injunction Act (28 U.S.C. 2283) allegedly gave it authority: (a) to enjoin the state court claims seeking coverage under the Royal policies; because (b) *Royal I* had allegedly decided mental anguish coverage in Royal's favor.[10] (R. 1439) (App. D, pp. 10-11). The Fifth Circuit Court of Appeals sustained that holding.[11] (*Id.*) The district court, however, also ruled that the "in aid of jurisdiction" exception had authorized it to enjoin the Texas state court actions relating to Royal's post-federal declaratory judgment tortious conduct. The investors appealed. The Fifth Circuit Court of Appeals reversed the latter holding; recognizing that the district court's invocation of the "in aid of jurisdiction" exception (ostensibly based upon *Royal I)* to enjoin the associated investors' prosecution of the assigned claims for Royal's post-federal judgment torts had violated the Anti-Injunction Act.[12] (R. 1439) (App. D, pp. 9-10).

Thereafter, Royal sought a final declaratory judgment and permanent injunction as to the investors' direct and

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[10] Concomitantly, Royal had moved for summary judgment seeking a declaration that the associated investors' post-declaratory judgment tort claims were invalid. The investors unsuccessfully sought a stay. The district court granted Royal's summary judgment on December 20, 1991. (App. D, p. 10).

[11] *Royal Ins. Co. of Am v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1287, 1301 (5th Cir. 1992).

[12] *Id.* at 1289-99 (enjoining suit against insurer for post-judgment torts violated Anti-Injunction Act); *accord Royal Ins. Co. of Am.*, 3 F.3d at 881; ***see also generally*** *Owen Equip & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (court may not extend ancillary jurisdiction to plaintiff's cause against nondiverse citizen).

assigned claims. On July 2, 1992, the district court (with no hearing) granted both of Royal's motions and permanently enjoined the associated investors from prosecuting Royal's: (a) coverage issues; and (b) post-federal declaratory judgment torts. The investors appealed those orders to the Fifth Circuit Court of Appeals which, in turn, affirmed them. *Royal Ins. Co. of Am.*, 3 F.3d at 889. The investors unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. *Quinn-L Corp., et al. v. Royal Ins. Co., et al.*, 114 S. Ct. 1541 (1994). (R. 2695, 2917, 2929) (App. D, pp. 10-11).

On July 18, 1995, the nondiverse unincorporated association member, PIP Partners, moved for relief under Fed.R.Civ.P. 60b(5) on the basis that the district court's previously entered permanent injunction should have no further prospective application. On December 5, 1995, another unincorporated association member, Paula Albertson (Albertson), filed a Rule 60b(5) motion wherein she asserted her own request for relief. PIP Partners and Albertson sought relief individually and on behalf of the unincorporated association of 157 investors which jointly owned claims by assignment from Quinn-L. They requested the district court to vacate/modify its previously entered permanent injunction, because it had never possessed subject matter jurisdiction over the real party in interest, the unincorporated association, under either 28 U.S.C. § 1332 (diversity) or 28 U.S.C. § 2283 (ancillary); especially, as to the association's Texas court actions for Royal's post-federal declaratory judgment torts. The motions argued that it was thus inequitable to continue an injunction against the real party to the controversy which, although enjoined, had never been a party to the suit in which the district court had issued the injunction.

(App'ts Rec. Excerpts "F," "J," "O"; R. 3551-3634, 3656-3725, 3788-3867 [vol. 16]) (App. C, D, pp. 11-15 & F, pp. 23-24).

The district court denied the Fed.R.Civ.P. 60b(5) motions on January 12, 1996. PIP Partners and Albertson, on behalf of themselves, the unincorporated association of 157 investors (enjoined, but not a party to the suit) and Quinn-L, appealed from that order. On December 30, 1996, the Fifth Circuit Court of Appeals, never addressing any of Petitioners' points of error, nonetheless affirmed the district court's previous denial of the Fed.R.Civ.P. 60b(5) motions on "essentially" the same basis. (App'ts Rec. Excerpts "B"; R. 3806 [vol. 16]) (App. A, B & D, p. 11).

REASONS FOR GRANTING THE WRIT

I.

THE RULING BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *NAVARRO SAV. ASS'N v. LEE* AND *CARDEN v. ARKOMA ASSOC.*, AS WELL AS DECISIONS OF OTHER LOWER FEDERAL COURTS

In *Navarro Sav. Ass'n*, 446 U.S. 458, this Court affirmed the Fifth Circuit Court of Appeals and ruled that to properly secure relief, a plaintiff had to sue the real party to the controversy; that is, the holder of the rights sought to be litigated. *Id.* at 460-61, 465. The real party to the controversy in *Navarro Sav. Ass'n* was an unincorporated association, or a "mere collection of individuals"

whose citizenship was comprised by that of each member. *Id.* at 561-62 & n.9. Thus, to have assumed diversity jurisdiction over a dispute with the real party to the controversy, this Court held in *Navarro Sav. Ass'n* that the lower court had to determine the unincorporated association's citizenship. *Id.*

This Court later reversed the Fifth Circuit Court of Appeals in *Carden*, 494 U.S. 185, and required all lower courts, in deciding which parties to consider for ascertaining diversity jurisdiction, to: (a) apply the "real party to the controversy test"; and (b) where the real party to the controversy was an unincorporated association, to determine its citizenship by taking into account the separate citizenship of each member.[13] *Id.* at 187 & n.1, 191-94 (Supreme Court has "never held" that courts could base diversity jurisdiction on citizenship of some but not all members of unincorporated association being sued) (for purposes of diversity jurisdiction, court may not consult citizenship of less than all of entity's members). This Court made equally clear in *Carden* that the rule regarding diversity was inflexible and no court was relieved from the duty to confirm the proper assumption, in the first instance, of jurisdiction by a lower court. *Id.* at 195. Despite the clear holdings of *Navarro Sav. Ass'n* and *Carden*, however, the court below nonetheless affirmed the district court's denial of Petitioners' Fed.R.Civ.P. 60b(5) motions and continued permanent injunction against the unincorporated association's pursuit of post-judgment

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[13] In *Carden*, this Court found that multiple respondents were not before it, but, instead, only a single entity, the "Arkoma Associates." *Id.* at 187 n.1.

Texas state actions when, in the first instance, the district court had never possessed federal subject matter jurisdiction over the real party to the controversy. (App. A).

In addition to being in conflict with the above decisions, the lower court's ruling also conflicted with the decisions of other lower federal courts, including other Fifth Circuit Court of Appeals' decisions. ***See, e.g.***, *Elliott v. Tilton*, 62 F.3d 725, 727 & n.4, 728 (5th Cir. 1995), *on reh'g remanded*, 69 F.3d 35, 36 (5th Cir. 1995) (court must consider unincorporated association citizen of any state in which members reside) (as real party to the controversy was unincorporated church, no diversity jurisdiction existed because members were nondiverse to plaintiffs); *Temple Drilling Co. v. La. Ins. Guar. Ass'n.*, 946 F.2d 390, 393 (5th Cir. 1991) (for diversity purposes, unincorporated association's citizenship was that of each member); *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 304-07 (5th Cir. 1991) (citizenship of association's members determined diversity jurisdiction); *Northern Trust Co. v. Bunge Corp.*, 894 F.2d 591, 594 (7th Cir. 1990) (in cases involving unincorporated association, relevant citizenship is that of individual partners); *Envirotech Corp. v. Bethlehem Steel*, 729 F.2d 70, 73 (2d Cir. 1984) (where real party in interest is unincorporated association, one of whose members is citizen of same state as a defendant, complete diversity lacking, even if nominal plaintiff satisfied diversity requirement); *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n.*, 715 F. Supp. 94, 98 (S.D.N.Y. 1989), *aff'd*, 896 F.2d 674 (2d Cir. 1990) (court would not permit plaintiff to sue unincorporated association in diversity simply by proceeding against only members diverse to plaintiff); *Varlotta Constr. Corp. v. Carla Dev. Corp.*, 886 F. Supp. 315,

317-18 (E.D.N.Y. 1995) (real party to controversy [joint venture comprised of two corporations] considered unincorporated association whose members' separate citizenship determined diversity); *Lowsley-Williams v. N. Lines Ins. Co.*, 884 F. Supp. 166, 170-71 (D.N.J. 1995) (if not an incorporated group, all unincorporated groups likened to partnerships where, for diversity, court must include each member's individual citizenship).

Just as it did in *Carden*, the Fifth Circuit Court of Appeals has, once again, disregarded this Court's mandate that the question regarding the parties which the court must consider for determining diversity jurisdiction must be answered by application of the "real party to the controversy test."[14] For diversity analysis, a federal court must include the individual citizenship of each member of an unincorporated association. *See Navarro Sav. Ass'n*, 446 U.S. at 461 (characterization of limited partnership unincorporated association as no more than "mere collection of individuals") (federal court must rest jurisdiction upon citizenship of real parties to controversy); *Carden*, 494 U.S. at 195-96 (citizenship of all association's members determined diversity jurisdiction). Petitioners have therefore requested this Court to grant review and again provide the Fifth Circuit Court of Appeals with direction.

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[14] However, the Fifth Circuit did correctly apply the required test in *Navarro*, as affirmed by this Court. *Navarro*, 446 U.S. at 458.

II.

IN VIEW OF THE MANDATORY REQUIREMENTS OF *NAVARRO SAV. ASS'N* AND *CARDEN*, THE LOWER COURT HAD NO DISCRETION TO AFFIRM THE DISTRICT COURT'S DENIAL, FOR ANY REASON, OF PETITIONERS' FED.R.CIV.P. 60b(5) MOTIONS

In *Royal II*, Royal chose to file its purely state claims in a federal forum; relying solely on diversity jurisdiction. To retain diversity jurisdiction for those state claims, Royal manipulated the parties to avoid, subtly, suing the real party to the controversy by: (a) dismissing the non-diverse associated member, PIP Partners; (b) never suing some associated members; and (c) suing, but not serving, other members. Royal's manipulation went undetected not only by Petitioners, but, as well, by the district court and the Fifth Circuit Court of Appeals.[15] Nonetheless, Royal secured all-encompassing relief against the never-sued, non-diverse and sole owner of the rights which it had sought to attack in *Royal II*, the unincorporated association; that is, despite the district court having never had subject matter jurisdiction over the associated investors under either 28 U.S.C. 1332 (diversity) or 28 U.S.C. § 2283 (ancillary).[16]

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[15] *Carden*, however, admonished all federal courts that they could always be called upon to decide diversity citizenship. *Carden*, 494 U.S. at 195-96.

[16] *See Elgin Nat'l Watch Co. v. Barrett*, 213 F.2d 776, 780 & n.11 (5th Cir. 1954) (citing *U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932), for proposition that injunction always subject to adaptation as events may shape needs) (courts cannot disregard significant changes in law or fact if to do so would turn permanent injunction into "instrument of wrong").

In this regard, no judicial panel has yet addressed the issues presently before this Court, to wit: (a) the citizenship of the real party to the controversy (Defendants) (the unincorporated association of 157 investors); and (b) Royal's (Plaintiffs) Illinois and New York citizenship which was non-diverse with that of the unincorporated association by virtue of member PIP Partners' Illinois and New York citizenship. (App. A & B).[17] Instead, the district court recited a litany of alleged reasons justifying its denial of the Fed.R.Civ.P. 60b(5) motions.[18] The Fifth Circuit Court of Appeals, never ruling on a single of Petitioners' points of error, merely affirmed the district court's denial for "essentially" the same reasons. (App. A & B).

Both courts built their rulings on a faulty premise – that, *arguendo*, the district court had possessed federal

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[17] Rather, in *Royal Ins. Co.*, 3 F.3d at 882-83, the Fifth Circuit decided only the unrelated and narrow jurisdictional issue that: (a) Royal Lloyd's of Texas was a Texas citizen by virtue of the citizenship of its legislatively mandated attorney-in-fact; and (b) Royal Lloyd's of Texas' state citizenship could not be collaterally attacked in a subsequent action. In *Royal II*, the district court had determined only that neither Royal plaintiff was a citizen of any state (Louisiana and Texas) whose citizenship was common solely to that of the joined investors. (App'ts Rec. Excerpts "F" Ex. 1; R. 3571 [vol. 16]) (App. F, p. 3 n.4). Neither of these findings were as to the unincorporated association's citizenship for diversity purposes. (App. A & B). *See also Kaspar Wire Works, Inc. v. Leco Eng'g & Machine, Inc.*, 575 F.2d 530, 536-37 (5th Cir. 1978) (only issue preclusion in declaratory judgment actions).

[18] In their appellate briefs to the Fifth Circuit Court of Appeals, Petitioners substantively refuted, legally and factually, each of the district court's justifications. (App. D, F & G).

subject matter jurisdiction in *Royal II*, which it never did. Thus, as affirmed by the Fifth Circuit Court of Appeals, the district court was able to impermissibly expand its federal jurisdiction beyond that sanctioned by law and permanently enjoin the never-sued, non-diverse unincorporated association from pursuing its rightful post-*Royal I* judgment tort claims.[19] ***See generally*** *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (rule regarding diversity, inflexible); *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (courts, no power by judicial fiat to extend jurisdiction over matter beyond authority creators granted); *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1950) (to permit judgment in removed case where court was without original jurisdiction, worked wrongful extension of federal jurisdiction and gave power denied to court by Congress); *Owen Equip. & Erection Co.*, 437 U.S. 365 at 377 (courts may not flaunt congressional mandate regarding diversity); *Int'l Assoc. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 771 (1996) (declaratory judgment act, not to expand federal jurisdiction).

The paramount issue before this Court is the complete absence of federal jurisdiction over the parties to *Royal II*. The district court, in the first place, had never possessed the power to: (a) enjoin the never-sued, non-diverse unincorporated association's pursuit of its

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[19] To reiterate, Petitioners are seeking the injunction's dissolution only as to the torts committed by Royal and others *after Royal I*. That is, Petitioners are not challenging the injunction's application to those issues finally declared by *Royal I*.

post-*Royal I* declaratory judgment tort claims; and (b) interfere with Texas state court proceedings. Therefore, it was not a discretionary matter whether to continue, absent any federal subject matter jurisdiction, a permanent injunction which had resulted in an unconstitutional "taking" of the real party to the controversy's (enjoined, but never sued) material and valuable legal rights. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (subject matter jurisdiction, while not subject to collateral attack, always open to direct attack); *Carden*, 494 U.S. at 195-96 (citing *Great S. Fire Proof Hotel Co.*, 177 U.S. at 453, for proposition that parties' failure to object to citizenship diversity until reached Supreme Court did not relieve said Court from ascertaining if lower court had properly taken jurisdiction). Therefore, as subject matter jurisdiction may not be waived, *Royal II* should have been dismissed and the injunction dissolved as to all matters beyond enforcing *Royal I's declaratory holdings*. ***See generally*** *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (no waiver of subject matter jurisdiction, court must dismiss if lacking).

III

THE ISSUE PRESENTED IS ONE INVOLVING IMPORTANT QUESTIONS OF FEDERAL LAW WHICH THIS COURT HAS ALREADY DECIDED, BUT THE FIFTH CIRCUIT COURT OF APPEALS HAS CONTRAVENED

It is fundamentally unfair and contravenes the most basic federal axioms to permit a lower federal court to forever strip a real party to the controversy (enjoined, but never sued) of its essential legal rights when that court

never had any subject matter jurisdiction, in the first place. Thus, the Fifth Circuit Court of Appeals' refusal to honor *Navarro Sav. Ass'n.* and *Carden* recommends this Court's definitive action.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that certiorari be granted and that the case be set down for briefing and oral argument; or, in the alternative, that certiorari be summarily granted.

Respectfully submitted,

SAMUEL L. BOYD, P.C.
Counsel of Record
BOYD & ASSOCIATES
Attorneys for Petitioners
One Galleria Tower, 21st Floor
13355 Noel Road, L.B. 87
Dallas, Texas 75240-6602
(972) 726-0204

APPENDIX A – RULING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ENTERED DECEMBER 30, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10078

ROYAL LLOYDS OF TEXAS;
ROYAL INSURANCE
COMPANY OF AMERICA,

Plaintiffs-Appellees,

versus

QUINN-L FINANCIAL
CORP. et al,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:90-CV-550-H)

(Filed Dec. 30, 1996)

Before JOLLY, JONES, and PARKER, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

The court has carefully considered appellants' position in light of the briefs, oral argument, pertinent portions of the record, and the extensive previous history of the case in this court. Having done so, we cannot say that the district court abused its discretion in denying appellants' Rule 60(b)(5) motion for relief from judgment, and we affirm on essentially the basis articulated by the district court.

AFFIRM.

APPENDIX B – MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION ENTERED JANUARY 16, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA and ROYAL LLOYDS OF TEXAS, INC.	*	Civil No. 3:90-CV-0550-H
Plaintiffs	*	
v.	*	
QUINN-L CAPITAL CORPORATION et al.	*	
Defendants	*	

MEMORANDUM OPINION AND ORDER

(Filed Jan. 12, 1996)

I. Background

Before the Court are Defendants' ("the Investors") Rule 60(b)(5) Motion, filed July 13, 1995; Plaintiffs' ("Royal Insurance Company" or "Royal") Response, filed August 21, 1995; Defendants' Reply, filed September 18, 1995; Plaintiffs' Additional Opposition, filed October 4, 1995; Defendant Paula M. Albertson's Rule 60(b)(5)

Motion, filed December 5, 1995; and Plaintiffs' Response to Albertson's Motion, filed January 4, 1996.

This convoluted lawsuit began in early 1988 when Royal filed its first petition for declaratory judgment in civil action CA-88CV-1069-H before this Court. Royal received a favorable final judgment, and on March 9, 1990, filed this suit seeking a declaratory judgment that it had no duty to defend the Investors. Royal then applied for a temporary restraining order ("TRO") to prohibit the Investors from pursuing certain actions in state court, which the Court granted on October 31, 1990.

After a hearing, the Court entered a preliminary injunction in favor of Royal, also barring the Investors from pursuing the state court actions, on November 30, 1990. *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 759 F.Supp. 1216 (N.D.Tex. 1990). Additionally, on December 20, 1991, the Court granted Royal's motion for summary judgment "as to all claims and affirmative defenses asserted in this action." Memorandum Opinion and Order of December 20, 1991 at 31. On May 5, 1992, the Fifth Circuit affirmed the Court's entry of the preliminary injunction. *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286 (5th Cir. 1992).

On July 1, 1992, the Court entered a final declaratory judgment and a permanent injunction barring Defendants from relitigating any of the claims or issues decided by the Court. Defendants appealed once again, and the Fifth Circuit affirmed again on September 27, 1993; the Supreme Court denied Defendants' petition for writ of certiorari on April 18, 1994. *Royal Ins. Co. v. Quinn-L*

Capital Corp., 3 F.3d 877 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1541 (1994).

Now, some fifteen months after the Supreme Court denied certiorari on their challenge to the declaratory judgment and permanent injunction entered by this Court, and five years after the preliminary injunction was entered, Defendants challenge again the Court's subject matter jurisdiction to have entered those orders. *See infra* at 4. Specifically, Defendants bring a Rule 60(b)(5) motion, contending that it is no longer equitable for the permanent injunction to have prospective application because the Court never had diversity jurisdiction. Defendants' Rule 60(b)(5) Motion at 12. The Defendants' Rule 60(b)(5) motion is only the latest part of what the Fifth Circuit described as a "tangled web of litigation." Plaintiff's Response at 1 (citing *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1301 (5th Cir. 1992)).

In essence, Defendants make two arguments in their pleadings. First, Defendants rely on *Bankston v. Burch*, 27 F.3d 164, 167-68 (5th Cir. 1994), for the proposition that: (a) complete diversity was forever destroyed at the moment of the joinder of all the limited partners, including PIP Partners, and (b) the Court, regardless of PIP Partners' presence or not as a party-defendant, should have considered PIP Partners' citizenship in determining diversity jurisdiction. Defendants' Rule 60(b)(5) Motion at 7, 10. According to Defendants, because PIP Partners was not diverse from Royal, the Court lacked diversity jurisdiction to enter the July 1992 declaratory judgment and permanent injunction. Defendants' Rule 60(b)(5) Motion at 6. Thus, Defendants argue, equity requires that the Court now modify its permanent injunction. *Id.*

Plaintiffs, however, correctly note that Defendants are barred from relitigating whether PIP Partners is an indispensable party because the Court ruled on December 20, 1991, that "the Professional Investors [PIP Partners] are not indispensable parties. Their interests are adequately represented by Quinn-L and the 156 diverse investors." Plaintiffs' Response at 6. Thus, the Court need not have considered the citizenship of PIP Partners for diversity purposes. *See* Fed.R.Civ.P.19(b); *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986) (affirming dismissal where joinder of indispensable party would destroy diversity).

Second, Defendants argue for the first time in their reply, filed September 18, 1995, more than five years after Quinn-L's assignment of its rights to Defendants, that the real party to the controversy is not Quinn-L Capital Corporation, but rather the "Partnership/Unincorporated Association (UA)" allegedly formed at the time that Quinn-L assigned its rights to the 157 investors. Defendants' Reply at 3-6. Apparently, Defendants argue that the Partnership/UA was necessarily formed because no investor individually received or owned any of Quinn-L's assigned rights. *Id.* Thus, Defendants contend, again relying on *Bankston*, Plaintiffs were required to sue the Partnership/UA. *Id.* The Court, Defendants argue, was therefore required to consider the citizenship of all 157 investors for diversity purposes. *Id.* Therefore, Defendants contend, because PIP Partners was nondiverse, the Court lacked subject matter jurisdiction. *Id.*

Plaintiffs respond that Defendants, having litigated subject matter jurisdiction and chosen not to raise its "partnership" argument before, must be bound by this

Court's finding of subject matter jurisdiction, expressly affirmed on appeal. Plaintiffs Supplemental Opposition at 2-4. Plaintiffs note that the doctrine of *res judicata* applies to jurisdictional determinations. Plaintiff's Supplemental Opposition at 3; Plaintiff's Response at 8 (quoting *Royal Ins. Co.*, 960 F.2d at 1293). Moreover, Plaintiffs add, *Bankston* does not strengthen Defendants' argument, as *Bankston* merely holds that a partnership is an indispensable party in a *derivative* action brought by a limited partner. Plaintiff's Response at 12 (citing *Bankston*, 27 F.3d at 168).

II. Analysis

A. Bankston does not apply.

The *Bankston*[1] case does not apply to the instant lawsuit. There is no partnership here; no language in Quinn-L's assignment of rights to the investors suggests that the "Partnership/UA" was formed or was a party to the action. Assignment of Claims dated September 4,

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[1] In *Bankston* a limited partner brought a state court action against a general partner for fraud or negligent misrepresentation, breach of fiduciary duty, mismanagement of waste and partnership assets, and breach of contract. The case was removed to federal court, and on appeal the Fifth Circuit held that the partnership was an indispensable party defendant, and that because the partnership and the plaintiff were both citizens of Texas, there was no complete diversity of citizenship. *Bankston*, 27 F.3d at 167-69. The Fifth Circuit broke its discussion into the following segments: "Derivative Claims by Limited Partners," "Indispensability of the Partnership," and "Diversity Jurisdiction and Limited Partnerships After *Carden*." The Fifth Circuit specifically noted that it was not departing from established precedent. *Id.* at 169.

1990; Exhibit A to Plaintiffs' Reply. Moreover, Defendants did not even raise the specter of the "Partnership/UA" until more than five years after it was allegedly formed via the assignment, in their reply to their Rule 60(b)(5) motion in an effort to overturn an unfavorable judgment. Clearly, Defendants should have, and could have, raised the "Partnership/UA" issue long ago.

B. Plaintiffs' Rule 60(b)(5) Motion was not timely filed.

Plaintiffs first sought injunctive relief in October 1990. Some five years later, Defendants, under the guise of a Rule 60(b)(5) motion, attempt to be freed from an unfavorable declaratory judgment and permanent injunction entered by the Court in July 1992 by arguing that the Court never had subject matter jurisdiction.

Rule 60(b)(5) provides:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons . . . (5) the judgment has been satisfied, released, or discharged, or . . . it is no longer equitable that the judgment should have prospective application. . . . The motion shall be made within a reasonable time.

Fed.R.Civ.P. 60(b)(5). The denial of a Rule 60(b) motion on the basis that the motion was not filed within a reasonable time is reviewed on appeal under the highly deferential abuse of discretion standard. *First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992).

Moreover, the determination of reasonable time depends on the particular facts of the case in question. *Id.*

Defendants contend that their July 13, 1995 filing of the Rule 60(b)(5) motion was within a reasonable time, because *Bankston* was not issued until July 29, 1994. But, the fact that *Bankston* was not issued until then does not help Defendants, because, as discussed above, the *Bankston* holding does not help Defendants. *See supra*, note 1.

III. Conclusion

Accordingly, for the reasons stated above, Defendants' Rule 60(b)(5) Motion is DENIED. Albertson's Rule 60(b)(5) Motion is DENIED. The permanent injunction remains in effect.

SO ORDERED.

DATED: January 12, 1996.

/s/ Barefoot Sanders
BAREFOOT SANDERS
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX C – AMENDED ORDER OF DISMISSAL IN THE DISTRICT COURT, DALLAS COUNTY, TEXAS 14TH JUDICIAL DISTRICT ENTERED APRIL 10, 1996

NO. 91-13811-A

QUINN-L CAPITAL CORPORATION, QUINN-L EQUITIES, INC., QUINN-L FINANCIAL CORPORATION, QUINN-L MANAGEMENT CORPORATION, and QUINN-L MORTGAGE COMPANY	§	IN THE DISTRICT COURT
VS.	§	DALLAS COUNTY, TEXAS
COYT RANDALL JOHNSTON and JOHNSTON & BUDNER, P.C.	§	14th JUDICIAL DISTRICT

AMENDED ORDER OF DISMISSAL

BE IT REMEMBERED that on the 1st day of March, 1996, this matter came before the Court having been placed on the Court's Dismissal Docket with notice to all parties. The Court heard argument of counsel for Plaintiffs and Defendants, considered the case and the pleadings on file herein, and received notification that a permanent injunction under 28 U.S.C. § 2283 has been entered by the United States District Court for the Northern District of Texas in *Royal Ins. Co. of Am. and Royal Lloyds of Texas v. Quinn-L Capital Corp., et al.*, No 3-90-CV-0550-H. Pursuant to 28 U.S.C. § 2283, the federal permanent injunction, now in effect, precludes Plaintiffs from prosecuting their claims herein. In consideration of the above and in an effort to manage the docket more

efficiently, the above-styled and numbered case will be and is hereby DISMISSED. The Court will reconsider reinstatement of the case, upon Plaintiffs' filing a motion to reinstate, in the event the United States Court of Appeals and/or the United States Supreme Court modifies and/or vacates the federal injunction now in place. The right to file a motion to reinstate shall continue until thirty (30) days after the related federal appellate proceedings become final.

IT IS FURTHER ORDERED that all costs of court are adjudged against the party incurring same.

IT IS SO ORDERED this 10th day of April, 1996.

/s/ John McClellan Marshall
JUDGE PRESIDING

APPENDIX D – BRIEF OF APPELLANTS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MAY 8, 1996

NO. 96-10078

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROYAL INSURANCE COMPANY OF AMERICA, ET AL.
Plaintiffs/Appellees

V.

QUINN-L CAPITAL CORPORATION, ET AL.
Defendants/Appellants

On Appeal From the
United States District Court for the
Northern District of Texas
Dallas Division
Honorable Barefoot Sanders, District Judge

BRIEF OF APPELLANTS

BOYD & ASSOCIATES

SAMUEL L. BOYD, P.C.
PRISCILLA E. PERRY
One Galleria Tower, 21st Floor
13355 Noel Road, LB 87
Dallas, Texas 75240-6608
(214) 726-0204
(214) 726-0208 (fax)

COUNSEL FOR APPELLANTS

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Mike Allen Adkisson, W.O. Akin, Gary R. Albertson, Jose L. Aliseda, Jerry H. Anderson, Lewis C. Barbe, Eileen Barbe, William J. Barrett, Jerome B. Bart, Bobby L. Bates, Steven J. Blackwell, E. William Boddeker, III, Mrs. William Boddeker, David G. Borman, Bowen Investments, Bronwyn Bowen, Bettie Bowen, William A. Bradley, Carla Nan Brooks Trust, Peter Brugger, Elena Brugger, Joseph E. Bruno, George T. Bryan, Charles B. Caldwell, Jr., J. Larry Caldwell, Mark N. Carraci, James Carrigan, Gloria Carrigan, George P. Catsulis, Jill E. Clarridge, Arthur Cobb, Paula Cobb, John J. Costanzi, Charles V. Court, Jr., Buford G. Crowley, Michael A. Cummins, Kenneth D. Cushman, Charles W. Daeschner, Jr., Elmer V. Dahl, Loyd F. Dale, D. William Davison, Keith D. Delatte, Jean Delatte, Marvin J. Descant, Warren F. Dodge, Edward L. Domingue, Grant A. Dove, William Dowhan, Alden W. Dudley, Jr., Donald G. Edgerton, Bobby Jack Estes, Charles J. Fagan, Elva Falkenberg, Roy M. Fleniken, M. Wayne Flye, Emil F. Frey, Jose A. Fuentes, Perry L. Fulcher, Nick Funston, Jack W. Gamble, W. Gerald Gaudet, John W. Goodman, Nancy J. Gribble, William J. Gribble, Dean O. Griffith, Jack L. Grindle, Edward B. Gripon, Richard S. C. Grisham, V. Bruce Hampton, Joseph S. Heard, Jorge Y. Herszage, Ross

H. Hicks, O. Bryan Holland, Rodney Holley, Dianne Holley, Robert W. Hood, Michael J. Howell, Ted Huang, Richard W. Huye, Bonner H. Jackson, Edward E. Jacobson, Charles B. Joachim, F. Allen Johnston, Peter H. Jones, Andrew B. Jordan, Jr., Mrs. Eugene "Carla" Karasewich, Richard L. Landry, H. Lee Leonard, Stephen C. Lesauvage, Edward E. Louis, Kenneth M. Lubritz, Milton H. Madeley, Jr., David V. Maraist, Mark D. Marshall, William H. Marshall, Jerald R. Martin, Daniel R. Martiny, Maxwell Lumber Company, Stephen E. McElmurry, G. Walter McReynolds, Curtis C. Miller, Morris R. Mitchell, Charles F. Moseley, George W. Moss, III, Sidney Louis Mouk, Stephen J. Murdoch, Wilbur Gene Murff, Edgar P. Nace, Kenwyn G. Nelson, Norman P. Neureiter, John C. O'Brien, Jr., Michael G. Page, Mark A. Palmer, Otto A. Papp, Loree Papp, Charles D. Peterson, Jr., Jack W. Pou, Gerald F. Powell, Michael A. Ramsay, Lorianne M. Reeves, Terry G. Rehn, Douglas H. Riddell, Newman L. Riechman, Nadine Reichman, J.B. Rochelle, III, Dan Salisbury, William C. Sandland, Jerome F. Scego, Jackie Scego, Russell W. Schroeder, Gail S. Schwinger, Cecil R. Simmons, William M. Simmons, A.O. Singleton, III, David A. Sirbasku, Donna M. Sirbasku, Mary Kay Smedstad, Thomas M. Smith, Simon Sonik, R. Malcolm Steward, Theodore B. Stubbs, James W. Swinnea, Jr., Antoinette C. Swinnea, Leonard E. Swischuk, James R. Tarrant, Sr., George E. Thomas, James C. Thompson, Jack A. Thurmond, Louis D. Tilotta, James L. Tucker, John A. Van de Wiele, James T. Walker, Joseph B. Walker, Paul A. Weber, Kurt G. Weiss, Craig Weisinger, Larry M. Wolford and Roger B. Yandell. (Appellants).

2. Quinn-L Capital Corporation, Quinn-L Capital Corporation, Quinn-L Equities, Inc., Quinn-L Financial Corporation, Quinn-L Management Corporation and Quinn-L Mortgage Company. (Assignors-Appellants).

3. Professional Investors Partnership II which, although voluntarily dismissed by Appellees, was, nonetheless, enjoined by the United States District Court for the Northern District of Texas. Professional Investors Partnership II is comprised by the individual investors of Dr. Patricia Blanton, Dr. James L.G. Cam, Dr. G. Lee Cranfill, Dr. D. William Davison, Dr. Anthony W. Gargiulo, Dr. J.M. Kochansky, Dr. Rodolfo Margo, Dr. Richard Phillips, Mrs. James S. Rogers, Dr. J. Daniel Subtelny, Dr. Jack A. Thurmond and Mrs. Wilfred D. Witeside. (Appellant).

4. Paula Albertson who, although never served by Appellees, was, nonetheless, enjoined by the United States District Court for the Northern District of Texas. (Appellant).

5. Mark S. Lovell (Lovell), sole voting shareholder of Quinn-L has an interest in the outcome of this case.

6. *Quinn-L Capital Corporation, et al. v. Johnston & Budner, et al.*, Cause No. 91-13811-A, in the 14th Judicial District Court of Dallas County, Texas, whose pendency has been stayed by the United States District Court for the Northern District of Texas, and subsequently dismissed as a direct result of the denial of the subject Fed. R. Civ. P. 60b(5) motions by the United States Court for the Northern District of Texas.

7. The 107th Judicial District Court of Cameron County, Texas, where the unincorporated association's damages claims for Plaintiffs/Appellees' post-declaratory judgment torts have been stayed by the United States District Court for the Northern District of Texas.

8. Royal Insurance Company of America and Royal Lloyds of Texas. (Appellees).

9. Presiding Judge, Honorable Barefoot Sanders, United States District Court for the Northern District of Texas.

10. Royal Lloyds, Inc., Royal Indemnity Company, Globe Indemnity Company, Safeguard Insurance Company, Newark Insurance Company, American and Foreign Insurance Company, and Dunn-Odom Insurance Company are Defendants in the pending state court actions which have been enjoined by order of Judge Sanders.

11. Samuel L. Boyd and Priscilla E. Perry of Boyd & Associates, Dallas, Texas, are lead counsel on appeal. Wayne Swift of Dallas, Texas; William R. Edwards and Michael G. Terry and the law firm of Edwards & Terry, Corpus Christi, Texas; John M. Weaver, Dallas Texas, have represented and/or representing Appellants in either or both the federal and enjoined state causes of action.

12. Randy A. Nelson and the law firm of Thompson, Coe, Cousins & Irons, Dallas, Texas; and Chester J. Hinshaw, Patricia Villareal and the law firm of Jones, Day, Reavis & Pogue, Dallas, Texas, represented Appellees below.

11. David M. Taylor and the law firm of Thompson, Coe, Cousins & Irons, Dallas, Texas; Rusty H. McMains and the law firm of McMains & Constant, Corpus Christi, Texas; Norton A. Colvin and the law firm of Rodriguez, Colvin & Chaney, Brownsville, Texas; and Gayle Keahey and the law firm of Vial, Hamilton, Koch & Knox, Dallas, Texas, represent Appellees and others in the state court actions which have been enjoined by the United States District Court for the Northern District of Texas.

/s/ Samuel L. Boyd, P.C.
Samuel L. Boyd, P.C.

STATEMENT REGARDING ORAL ARGUMENT

Appellants, an unincorporated association comprised of 157 members, request oral argument because this case presents significant and complicated issues of law and fact. Specifically, Appellants have properly sought relief through the filing of Fed.R.Civ.P. 60b(5) motions by Professional Investors Partnership II and Paula M. Albertson. Appellants have demonstrated that it is no longer equitable for the permanent injunction previously entered against them, individually (that is, not against the never-sued unincorporated association), by the United States District Court for the Northern District of Texas to have prospective application. This is especially true as Appellants have recently suffered the dismissal of the unincorporated association's post-declaratory judgment tort claims in a Texas state court proceeding. Yet, the United States District Court for the Northern District of Texas never possessed subject matter jurisdiction by which to

have enjoined Appellants, because: (a) there was no ancillary jurisdiction (as held by this Court) over the post-declaratory judgment torts; and (b) no alternative jurisdictional source existed under 28 U.S.C. § 1332 by which to have exercised diversity jurisdiction over the post-declaratory judgment torts.

This appeal questions whether the United States District Court for the Northern District of Texas properly denied the Fed.R.Civ.P. 60b(5) motions of Paula M. Albertson and Professional Investors Partnership II when, by those motions, the court was apprised of its complete lack of subject matter jurisdiction by which to have enjoined each of the 157 Investors from the unincorporated association's pursuit of its assigned, jointly owned claims for the post-declaratory judgment torts of Royal Insurance Company of America, Royal Lloyds of Texas, and other parties in various state court actions. Although this particular jurisdictional issue on appeal may, at first blush, appear deceivingly simplistic, the facts set forth below reveal their particularly complex nature. Additionally, as the United States District Court for the Northern District of Texas was without any jurisdictional grounds by which to have permanently enjoined the unincorporated persons and entities from pursuing the association's damages claims in the Texas state courts, oral argument is especially important.

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STATEMENT OF JURISDICTION

This appeal is from the United States District Court for the Northern District of Texas' (district court) denial of the Fed.R.Civ.P. 60b(5) motions filed by Professional Investor Partnership II (PIP Partners) and Paula M. Albertson (Albertson) on behalf of themselves and the unincorporated association of Investors/Defendants; all of whom jointly owned claims assigned under Texas law by the Quinn-L Defendants[1] against Plaintiffs Royal Insurance Company of America, Royal Lloyds of Texas (collectively, Royal). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. **WAS IT ERROR** to deny the Fed.R.Civ.P. 60b(5) motions of PIP Partners and Albertson when it was no longer equitable for the previously entered permanent injunction to have prospective application in view of the district court having never had subject matter jurisdiction by which to have enjoined any of the Investors (including

---

[1] Specifically, Quinn-L Capital Corp., Quinn-L Equities, Inc., Quinn-L Financial Corp., Quinn-L Management Corp. and Quinn-L Mortgage Corp. partnerships (collectively, Quinn-L).

PIP Partners and Albertson) or Quinn-L from the unincorporated association's pursuit of its state court damages actions for the post-declaratory judgment torts of Royal and others, because: (a) as found by this Court in *Royal Ins. Co. of Am. v. Quinn-L Capital Corps.*, 3 F.3d 877, 881 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1541 (1994), the district court never had ancillary jurisdiction over the post-declaratory judgment torts committed by Royal; and (b) the district court had no alternative jurisdictional source under 28 U.S.C. § 1332?

2. **WAS IT ERROR** to continue enjoining the Investors from pursuing the unincorporated association's post-declaratory judgment claims when said association, the real party to the controversy, was neither sued nor subject to the district court's jurisdiction?

3. **WAS IT ERROR** to deny the Fed.R.Civ.P. 60b(5) motions of PIP Partners and Albertson, because *res judicata* allegedly barred consideration of the requested relief?

4. **WAS IT ERROR** to deny the Fed.R.Civ.P. 60b(5) motions of PIP Partners and Albertson on the basis that, allegedly, they were not timely?

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in Court Below

On 2 July 1992, the district court permanently enjoined the Defendants/Investors (and those in privity) from prosecuting Royal's: (a) coverage issues; and (b) post-declaratory judgment torts based upon ancillary

jurisdiction. (R. 2917, 2929). Thereafter, the Fifth Circuit held that the district court's ancillary jurisdiction did not extend to the Investors' claims for Royal's post-declaratory judgment torts.[2])

On 13 July and 5 December 1995 PIP Partners and Albertson filed their respective Fed.R.Civ.P. 60b(5) motions. (App'ts Rec. Excerpts "F" & "Q";[3] R 3551, 3770 [Vol. 16]).[4] PIP Partners and Albertson sought relief individually and on behalf of the unincorporated association of 157 Investors which owned claims by assignment from Quinn-L. PIP Partners and Albertson requested the district court to vacate/modify its previously entered permanent injunction. The court had never possessed subject matter jurisdiction over the real party in interest, the unincorporated association, under either 28 U.S.C. § 1332 (diversity) or 28 U.S.C. 2283 (ancillary); especially, as to the association's Texas court actions for Royal's post-declaratory judgment torts. It was thus inequitable to

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[2] *See Royal Ins. Co. of Am.*, 3 F.3d at 881.

[3] Appellants have designated their record excerpts (mandatory and optional) as "App'ts Rec. Excerpts"___."

[4] Albertson filed a separate Rule 60b(5) motion, because the district court would not permit PIP Partners to specifically respond to two (2) new assertions raised by Royal in its 3 October 1995 additional opposition to PIP Partners' reply and supplement. (App'ts Rec. Excerpts "K," "L," "M," "O," Ex. 2, "P"; R. 3726, 3729, 3732, 3738, 3768 [Vol. 16]). The district court refused PIP Partners' request. (App'ts Rec. Excerpts "P"; R. 3768 [Vol. 16]). Thereafter, Albertson filed her Rule 60b(5) motion and, in addition to incorporating the arguments previously set forth by PIP Partners, she also replied to Royal's new assertions. (App'ts. Rec. Excerpts "Q"; R. 3769 [Vol. 16]).

continue an injunction against the real party to the controversy which, although enjoined, had never been a party to the suit in which the district court had issued the injunction. Specifically, PIP Partners and Albertson focused the court's attention upon its duty to have considered (whether never sued or later dismissed) the separate citizenship of all 157 Investors (including PIP Partners and Albertson), because altogether, they formed an unincorporated association of claimants which jointly owned the rights the court sought to litigate. That is, the unincorporated association was the real party to the controversy regarding claims for Royal's post-declaratory judgment torts. (App'ts Rec. Excerpts "F," "J," "O," "Q" & "T"; R. 3551-3634, 3656-3725, 3738-67, 3769-85, 3798-3805 [Vol. 16]).

Despite Albertson and PIP Partners having demonstrated the district court's complete lack of subject matter jurisdiction regarding the post-declaratory judgment torts, it nonetheless denied the Fed. R. Civ. P. 60b(5) motions on 12 January 1996. (App'ts Rec. Excerpts "B"; R. 3791 [Vol. 16]). PIP Partners and Albertson, on behalf of themselves, the unincorporated association of 157 Investors (enjoined, but not a party to this suit) and Quinn-L, have appealed from that order. (App'ts Rec. Excerpts "A"; R. 3806 [Vol. 16]).

II. Statement of Facts

A. The Consolidated Federal Investor Action

Beginning in May 1987, some 157 Investors filed 26 separate suits in the district court and asserted fiduciary

breaches, federal and state securities claims, anti-racketeering claims, and other claims under Texas law. The Investors sought to recover damages suffered as a result of their investments in various real estate ventures promoted or managed by Quinn-L. (R. "A-3" Exs. 1-21, 23, 25-26). Royal defended Quinn-L in the federal suits. (R. "A-5" Ex. 6, p. 2). Judge Sanders consolidated the 26 federal actions against Quinn-L.

B. *Royal I*

On 10 May 1988, Royal filed its first declaratory judgment action (*Royal I*) to establish its duty or not to defend or indemnify Quinn-L against the Investors' claims (R. "A-3" Ex. 27, p. 3). Judge Sanders also presided over *Royal I*.

In the consolidated *Royal I* action, Royal failed to join the Investors who were suing Quinn-L. Thus, the Investors attempted to intervene, but the district court denied their motion. (R. "A-5" Exs. 12 & 13). Later, the Investors again sought to directly participate by, on the basis of a tentative settlement, offering to substitute their counsel for that of Quinn-L who were unpaid and disinterested in representing Quinn-L under such circumstances. (R. "A-7" Ex. 32). The district court also denied the Investors' second attempt. Thus, Royal had succeeded in fully excluding the Investors from litigating the coverage issue in *Royal I*. (SJExs. "3-KK" & "3-LL").[5]

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[5] The Investors' *Royal I* summary judgment exhibits to which the clerk had not assigned an exhibit designation are referred to as "SJ Ex.___."

On 12 December 1988, Royal moved for summary judgment, claiming no duty to: (a) defend Quinn-L in the various federal investor suits; and (b) cover or indemnify under the policies for any losses which arose from those claims. (R. "A-5" Ex. 1, pp. 5-10). Quinn-L asserted that the Investors were seeking to recover damages for mental anguish claims which were covered by the Royal policies. (R. "A-6" Ex. 24, p. 9). On 14 April 1989, the district court granted Royal's partial summary judgment motion. (R. "A-J" Ex. 6). On 8 September 1989, the district court entered a final declaratory judgment in *Royal I.* (R. "A-5" Ex. 8).

C. The Federal Investor Action's Dismissal

In 1989, the Investors and Quinn-L tentatively proposed a settlement that called for: (a) a judgment against Quinn-L in the federal liability suit which awarded the Investors, respectively, a cumulative sum of $32.5 million; and (b) Quinn-L to assign its claims against Royal, and others, to the Investors. Royal authorized Quinn-L to go forward with the proposed settlement.(R. "A-5" Exs. 33-36; "A-7" Exs. 48 & 53; "A-11" Ex. 161). Royal then withdrew its initial approval, stating that it had only just learned of the settlement's disposition of the Investors' mental anguish claims which might have been covered under the relevant policies. (R. "A-5" Ex. 36). Thus, Quinn-L did not consummate the proposed settlement at Royal's request.

While the investors and Quinn-L continued to explore settlement of the federal liability/tort suit, the absence of mental anguish allegations in the earlier

pleadings gave Royal the excuse to urge that, under the complaint allegation rule, it had not been provided notice of any mental anguish or other personal injury claims. (R. "A-5" Exs. 1 & 3; "A-11" Ex. 166). Therefore, on 3 August 1989, the Investors moved to dismiss: (a) with prejudice, their federal claims against Quinn-L; and (b) without prejudice to their state law claims. (R. "A-5" Ex. 29). The Court entered an order to that effect on 28 August 1989. (R. "A-5" Ex. 30).

D. The *Atkinson* Action in the Dallas State Court

On 13 September 1989, the Investors brought their state law claims against Quinn-L in Dallas County based entirely upon Texas law (*Atkinson*). For the first time, they pleaded mental anguish caused by Quinn-L's negligence and gross negligence. (R. "A-5" Ex. 18, p. 21).

Quinn-L had forwarded the *Atkinson* suit papers to Royal, and demanded that Royal acknowledge coverage and defend it. After 40 days, Royal offered to qualifiedly defend Quinn-L. (R. "A-5" Exs. 39 & 43, p. 3-4). Royal also advised Quinn-L that if it chose to accept, it should contact Royal to discuss the attorney who would represent it in *Atkinson*. (R. "A-5" Ex. 43, p. 4).

Royal suggested no urgency for any Quinn-L response. However, without notice and despite the outstanding *Royal I* declaratory judgment, Royal hired C. Randall Johnston (Johnston) (*Tilley*[6] counsel) on that same day and instructed him to immediately answer for

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[6] *Employers Ins. Co. v. Tilley*, 484 S.W.2d 802 (Tex. Civ. App. – Beaumont 1972), *aff'd*, 496 S.W.2d 552 (Tex. 1973).

Quinn-L. Yet, no Quinn-L entity had been properly served and no answer was then due. Johnston filed a general denial on 17 November 1989: (a) waiving service defects and personal jurisdiction issues; and (b) without ensuring proper service or preserving any jurisdictional challenges. Quinn-L had no opportunity to reply to Royal's qualified offer, because despite its contrary assurances, Royal had assumed the defense. (R. "A-7" Ex. 62; "C-7", pp. 31-32; R. Vol. 12 Ex. "B", p. 6).

On 9 January 1990, Quinn-L formally rejected Royal's assumption of a qualified defense and again demanded that royal acknowledge coverage. (R. "A-5" Ex. 45). Royal ostensibly instructed Johnston to take no further action, but he remained, without Quinn-L's authority or approval, in the suit as Quinn-L's defense counsel for another five (5) months. During this time, Johnston engaged in prohibited conduct that resulted in significant damage to Quinn-L. (R. "A-5" Ex. 45; "A-7" Ex. 69; "A-8" Ex. 89; "A-11" Ex. 152).

For example, without conducting any investigation, having no personal knowledge of the true facts, and never consulting with his clients, Johnston perfunctorily denied, within two (2) days of his receipt, a total of 600 admission requests served upon Quinn-L. (R. Vol. 12 Ex. "B-8" & p. 48; Ex. "B-10," p. 7). The Investors offered relief; that is, to permit withdrawal of the improper boilerplate denials and to extend the deadline for proper responses. Johnston refused. (R. "A-5" Ex. 48; "K-7" Ex. 4). Based upon Johnston's conscious and unequivocal violations of Texas law, the state court thereafter granted sanctions and deemed admitted all of the requests. (R.

"A-5" Ex. 48; "A-8" Exs. 79 & 89; Vol. 12 Ex. "B," p. 10; "C-7", p. 147).

Johnston also failed to: (a) take steps to alleviate Quinn-L from the highly detrimental results of his appearance on their behalf; (b) make any attempt to continue the August 1990 trial setting before his belated June 1990 withdrawal; and (c) relieve Quinn-L from the consequences of his sanctionable discovery conduct. (R. "C-7", pp. 73, 146). Finally, Johnston improperly inserted himself into coverage issues. (R. 1275-76). Indeed, Johnston wrote Royal and offered his services to "protect the interests of the company"; expressing concern to Royal that his steps on Quinn-L's behalf might prove adverse to Royal. (R. "A-5" Ex. 49).

On 6 August 1990, the state court, pursuant to its 29 March 1990 notice to all counsel (including Johnston), called the case to trial. (R. "A-9" Ex. 106, pp. 6-8). On 7 August 1990, after receiving evidence in a trial on the merits, the state court ruled in the respective Investors' favor against Quinn-L based upon the deemed admissions and its own exemplary damages' determination which resulted in a cumulative judgment of approximately $741 million. (R. "A-8" Ex. 90). Subject to the judgment becoming final, the Investors thus became Quinn-L's judgment creditors on August 7th.

E. Quinn-L's Assignment to the Investors (Jointly)

On 4 September 1990, two (2) days before the judgment became final, Quinn-L assigned its rights against Royal and others to the Investors, jointly. The individual Investors were also Quinn-L's judgment creditors and, as

well, third-party beneficiaries under the Royal policies. (App'ts Rec. Excerpts "F" Ex. 3-A, "J" Ex. A; R. 3584-86, 3672 [Vol. 16]; R. "A-6" Ex. 4).

F. The Cameron County State Court Actions

1. The Investors' Cameron County liability action

In their joint assignee capacity and individual capacity as judgment creditors, the associated Investors filed a state court damages action in Cameron County, Texas, against Royal and others on 4 September 1990. (R. "A-5" Ex. 20). As Quinn-L's joint assignees, the associated Investors sought damages caused by Royal's tortious conduct with respect to the "defense" which it had provided Quinn-L in the *Atkinson* action, as well as indemnity under the policies. As judgment creditors, the individual Investors also sought the third-party insurance benefits provided under the Royal policies. (R. "A-5" Ex. 20).

2. The Investors' Cameron County declaratory judgment action

On 17 September 1990, the associated Investors filed a declaratory judgment action in Cameron County that Royal was directly liable (first-party) to them for the *Atkinson* judgment. (R. "A-5" Ex. 21). The associated Investors claimed that: (a) as the damages awarded them in *Atkinson* were for injuries covered by the relevant Quinn-L/ Royal policies, Royal should have offered Quinn-L an unqualified defense and coverage; and (b) Royal had waived its right to, or was estopped from,

denying coverage under the policies due to its conduct towards Quinn-L in *Atkinson*. (R. "A-5" Ex 21).

G. *Royal II*

On 9 March 1990, after the district court had refused Royal's request to reopen *Royal I* to review coverage issues arising from the new pleadings in the Dallas state action, Royal simply filed a completely new federal declaratory judgment action. (R. 001). Royal sought a declaration that the policies had not obligated them to defend or indemnify Quinn-L in *Atkinson*. Royal neither sought enforcement of the first declaratory judgment,[7] nor pleaded *res judicata/collateral* estoppel. (R. 001).

On 15 August 1990, Quinn-L filed its answer. On 27 September 1990 (after Quinn-L had assigned its claims), Royal joined all the Investors to *Royal II* on the basis that each of the 157 was a Quinn-L judgment creditor as a result of *Atkinson's* judgment. (R. Vol. 10; "A-5" Ex. 16 pp. 2, 4-5).

On 29 October 1990, Royal sought a temporary restraining order (TRO) to prevent the Investors from prosecuting the unincorporated association's state court actions. (R. 769). On 31 October 1990, the district court enjoined Quinn-L, the Investors, and everyone in privity with them, from attempting to impose liability on Royal in any forum based upon *Atkinson's* judgment. (R. 929). Coincidentally, at the time the district court's TRO, the

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[7] In this regard, the district court expressly considered *Royal I* closed, and suggested that coverage issues could be litigated in a state court action. (R. "A-5" Exs. 10 & 11).

Cameron County Court had been poised, then one (1) week away, to have decided the Investors' summary judgment which might have been dispositive of the case. (R. 2889).

On 30 November 1990, the district court issued a preliminary injunction in Royal's favor. The district court ruled that the "relitigation exception" to the Anti-Injunction Act allegedly gave it authority: (a) to enjoin the state court claims seeking coverage under the Royal policies; because (b) *Royal I* had allegedly decided mental anguish coverage in Royal's favor. (R. 1439). This Court sustained that holding. The district court also ruled that the "in aid of jurisdiction" exception to the Act authorized it to enjoin the Texas district court actions relating to Royal's post-declaratory judgment tortious conduct; thus, wrongfully depriving the Texas court of its constitutional right and duty to exercise its bona fide jurisdiction. (R. 1439). This Court reversed that holding.

The Investors appealed. Concomitantly, Royal moved for summary judgment seeking a declaration that the associated Investors' post-declaratory judgment tort claims were invalid. (R. 1629). The Investors, albeit unsuccessfully, sought a stay of that motion from both the district court and the Fifth Circuit, because a ruling could have circumvented the interlocutory appeal. (R. 1695, 1803, 1819).

Notwithstanding the Investors' complaints, the district court granted Royal's summary judgment on 20 December 1991. (R. 2647). On 5 May 1992, this Court decided the preliminary injunction appeal by affirming the "relitigation exception injunction directed to the

Investors' direct claims" under the policies. On the same hand, this Court recognized that the district court's invocation of the "in aid of jurisdiction" exception (ostensibly based upon *Royal I*) to enjoin the associated Investors' prosecution of the assigned claims for Royal's post-judgment torts violated the Anti-Injunction Act. (R. "A-25").

Royal then sought a final declaratory judgment and permanent injunction as to the Investors' direct and assigned claims. (R. 2695). With no hearing, the district court granted both of Royal's motions and entered, without modification, the orders drafted by Royal's counsel. (R. 2917, 2929). The Investors appealed those orders to the Fifth Circuit, which affirmed them. *See Royal Ins. Co. of Am.*, 3 F.3d 877. The Investors unsuccessfully petitioned the United States Supreme Court for a writ of certiorari. *See Quinn-L Corp. et al. v. Royal Ins. Co., et al.*, 114 S.Ct. 1541 (1994).

On 18 July 1995, PIP Partners moved for relief under Fed.R.Civ.P. 60b(5) on the basis that the district court's previously entered permanent injunction should have no further prospective application, because: (a) the court has been without ancillary or diversity jurisdiction; and (b) Royal never sued the real party to the controversy, the unincorporated association. (App'ts Rec. Excerpts "F," "J," & "O"; R. 3551-3634, 3656-3725, 3738-67 [Vol. 16]). On 5 December 1995, Albertson filed a Rule 60b(b) motion wherein she asserted her own request for relief and, as well, controverted two (2) new points raised by Royal in a reply to PIP Partners' motion for which the district court had not permitted any rebuttal by PIP Partners. (App'ts Rec. Excerpts "O" & "P"; R. 3738-67, 3768 [Vol. 16]).

On 12 Janaury 1996, the district court denied the PIP Partners/Albertson Fed.R.Civ.P.60b(5) motions. (App'ts Rec. Excerpts "B"; R. 3791 [Vol. 16]). PIP Partners and Albertson, individually and on behalf of the Investor's unincorporated association, have appealed from that order. (App'ts Rec. Excerpts "B"; R. 3806 [Vol. 16]).

SUMMARY OF THE ARGUMENT

Under the Quinn-L written assignment, the 157 Investors (including Albertson and PIP Partners) jointly shared an undivided interest in Quinn-L's claims against Royal. (App'ts Rec. Excerpts "J" Ex. A; R. 3672 [Vol. 16]). Simply, all 157 Investors: (a) were members of an unincorporated association (*e.g.*, a partnership); who (b) jointly owned Quinn-L's assigned claims against Royal and others. No Investor held any individual ownership rights in the assigned claims, because each unincorporated association member shared an undivided interest in the assigned claims. (App'ts Rec. Excerpts "F" Exs. 4-1, 4-2, "J" Ex. A, "O" Ex. 2-B, p. 20, "Q" & "T"; R. 3551-3634, 3620-26, 3627-29, 3656-3725, 3672-84, 3746-51, 3760-61, 3769-85, 3798-3805 [Vol. 16]).

Incidentally, each of the associated 157 Investors (including Albertson and PIP Partners) was also a partner in the *Atkinson, et al.* partnership. *(Id.)*. In turn, the partnership owned the group's assigned rights. No partner individually owned any of the assigned rights. Instead, by the assignment, each general partner shared an undivided interest in the assigned claims. *(Id.)*.

Through filed pleadings and document production in September 1990, Royal was on express notice of the

assignment's joint nature. (App'ts Rec. Excerpts "F" Ex. 3-A, "O" Ex. 2-B; R. 3584-86, 3760-61 [Vol. 16]). (*e.g.*, Lee Cranfill (Cranfill) affidavit: "[PIP Partners], by written contract, is an assignee, jointly, with all of the other Plaintiffs in Cause No. 89-11030-M, of all of the rights of the Quinn-L Defendants against [Royal and others]"). Yet, Royal never sued: (a) the unincorporated association, because it failed to join each Investor/unincorporated association member/general partner; and/or (b) the partnership.[8] By its conduct, Royal improperly manufactured diversity jurisdiction.

Based upon ancillary jurisdiction, the district court permanently enjoined the Investors, whether or not parties, from prosecuting the *Royal I* coverage issues and post-declaratory judgment torts. (R. 2917, 2929). However, the Fifth Circuit subsequently held that the district court's ancillary jurisdiction did not extend to Royal's post-judgment tortious conduct.[9] By this Court's ruling, the district court had lost its primary, stated jurisdictional basis.

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[8] Royal failed to sue William J. Gribble; instead, suing the nonexistent entity, "William J. Gribble Trust." (App'ts Rec. Excerpts "J" Ex. C, p. 13; R. 3697, 3712 [Vol. 16]). Royal named, but never served, various other unincorporated association members such as Albertson. (App'ts Rec. Excerpts "J" Ex. C at Appendix A, p. 1; R. 3697, 3700 [Vol. 16]). Finally, Royal dismissed PIP Partners, an unincorporated association member. (App'ts Rec. Excerpts "J" Ex. D; R. 444; 3714-15 [Vol. 16]). PIP Partners and the never-served unincorporated association members (*e.g.*, Albertson) did not answer Royal's complaint. thus, the unincorporated association of Investors, PIP Partners, Albertson and other partners, were never parties to *Royal II*.

[9] *See Royal Ins. Co. of Am.*, 3 F.3d at 881.

In its findings of fact, the district court had alternatively claimed subject matter jurisdiction under 28 U.S.C. § 1332 (diversity). (App'ts Rec. Excerpts "J" Ex. E; R. 3717-19 [Vol. 16]). Diversity jurisdiction was unavailable to the district court, because:

a. Royal had failed or refused to sue the real party to the controversy, a nondiverse unincorporated association/partnership;

b. Despite royal's jurisdictional manipulation, the district court was duty-bound to have considered (but did not) the citizenship of each unincorporated association member or partner; including, but not limited to, absent members such as the nondiverse PIP Partners; and

c. The district court, never having diversity jurisdiction over the post-declaratory judgment tort disputes, sought to eschew its void by accommodating Royal's manipulation of the parties.

In denying the PIP Partners/Albertson Fed.R.Civ.P.60b(5) motions, the district court ruled: (a) by its previous finding of PIP Partners' dispensability (because its interests had allegedly been adequately represented by Quinn-L and the 156 diverse Investors), *res judicata* barred relitigation of that issue;[10] (b) as the Investors had litigated

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[10] The district court failed to address Albertson's separate motion or Royal's failure to have sued the owner of Quinn-L's assigned claims, the unincorporated association/partnership. Royal had named Albertson as a Defendant to *Royal II*, but had not served her with its complaint. Albertson thus never answered, and was not a party to *Royal II*. As well, Royal never sued the unincorporated association. Hence, the owner of Quinn-L's assigned claims was no a party to *Royal II*. (App'ts

the district court's subject matter jurisdiction, but had not previously raised the "partnership" argument, they were bound by the district court's finding of subject matter jurisdiction; and (c) the Rule 60b(5) motions were not timely. (App'ts Rec. Excerpts "B"; R. 3791-97).

The district court's denial of the PIP Partners/Albertson Fed. R. Civ. P. 60b(5) motions was in error, because as to the post-declaratory judgment torts: (a) the district court could not circumvent its duty to confirm jurisdiction (by disregarding the citizenship of absent unincorporated association members/general partners) through resort to "virtual representation"; especially, when Royal had never sued the actual owner of Quinn-L's assigned claims; (b) Royal had never sued the real party in controversy (the right party), the unincorporated association of Investors; (c) irrespective of personal jurisdiction over some association members (none of whom were, individually, the real party to the controversy), the district court had no basis by which to have exerted jurisdiction over the nondiverse unincorporated association of Investors; (d) every federal court, at every level, is called upon to decide diversity citizenship;[11] (e) every federal court's authority to pass on its own jurisdiction is always open to direct attack; (f) based upon a significant modification in law or changed circumstances which rendered it no

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Rec. Excerpts "J" Ex. C at Appendix A, p. 1; R. 3697, 3700 [Vol. 16]).

[11] Appellants request the Fifth Circuit to take judicial notice that: (a) complete diversity did not exist below; and (b) therefore, the district court did not properly take jurisdiction of *Royal II*.

longer equitable for the judgment to have prospective application, PIP Partners and Albertson had brought their motions within a reasonable time under Fed.R.Civ.P. 60b(5); and (g) the never sued real party to the controversy, the unincorporated association of Investors, has suffered a prejudicial loss of legal rights by virtue of the dismissal of a pending action against Johnston in the 14th district court of Dallas County.

ARGUMENT

I. *Royal II's* Declaratory Judgment and Permanent Injunction Must Be Vacated, Because the District Court lacked Subject Matter Jurisdiction Over the Assigned post-*Royal I* Declaratory Judgment Claims

A. Each Investor,[12] Including PIP Partners and Albertson, an Unincorporated Association Member and/or Partner

Under Quinn-L's assignment, each of the associated 157 Investors jointly shared an undivided interest in Quinn-L's claims against Royal. Specifically, each of the 157: (a) were members of an unincorporated association; and (b) jointly owned Quinn-L's assigned claims. No investor held any individual ownership rights in the assigned rights. Instead, each member's joint ownership rights were derivative, only. (App'ts Rec. Excerpts "F" Exs. 3-A, 4-1, 4-2; R. 3584-86, 3620-26, 3627-29 [Vol. 16]). On the same hand, each of the 157 Investors was also a

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[12] PIP Partners and Albertson were two (2) of the 157 Investors who had originally brought suit in the district court in 1987 against Quinn-L. (R. "A-3" Exs. 1-21, 23, 25-26).

general partner in the *Atkinson, et al.* partnership (comprised of all 157). Each member or partner, by and through the Quinn-L assignment, shared a undivided interest in the claims previously owned by Quinn-L. (App'ts Rec. Excerpts "F" Exs. 4-1, 4-2; R. 3620-26, 3627-29 [Vol. 16]).

Initially, Royal named PIP Partners as a Defendant in *Royal II*. However, upon PIP Partners' motion to dismiss for want of jurisdiction, Royal realized that PIP Partners' inclusion as a party destroyed diversity. Despite the remaining Defendants' objections, Royal quickly nonsuited that association member/partner. (App'ts Rec. Excerpts "F" Exs. 3 & 5, "Q" Ex. B; R. 3580-83, 3631-32, 3760-61 [Vol. 16]) (*e.g.*, according to Royal, Quinn-L's assignment of rights to the Investors [jointly], including PIP Partners as a completely nondiverse assignee out of the 157, allegedly did not "offset" the court's jurisdiction). Royal had also named Albertson as a Defendant, but they never issued summons or served her with their complaint. (App'ts Rec. Excerpts "J" Ex. C; R. 3697, 3700 [Vol. 16]). Royal never sued the unincorporated association. Neither the unincorporated association, PIP Partners nor Albertson ever appeared or participated in *Royal II*.

Without acknowledging the unincorporated association or its lack of diversity jurisdiction, the district court nonetheless granted Royal summary judgment and entered a permanent injunction against all 157 Investors, including Albertson and PIP Partners, in *Royal II*. (R. 2917, 2929).[13] More specifically, the district court prevented the unincorporated association/partnership from

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[13] As the wife of Defendant Guy R. Albertson, an investor, Albertson's community property interest has been

prosecuting its various state court actions pending in Cameron and Dallas Counties for damages[14] against, amongst others, Royal for the latters' post-*Royal I* (declaratory judgment) tortious conduct. (*Id.*).

Thus, PIP Partners and Albertson brought their Rule 60b(5) motions on their individual behalves and on behalf of all the Investors, each of whom were members of: (a) and unincorporated association; and (b) the *Atkinson, et al.* partnership. (App'ts Rec. Excerpts "F," "J" and "Q"; R. 3551-3634, 3656-3725, 3769-85 [Vol. 16]). That is, each individual Investor (whether generally an unincorporated association member or specifically a partner): (a) jointly owned, each with the other, the assigned claims; and (b) contributed their respective assigned claims in return for a percentage in any total recoveries. (App'ts Rec. Excerpts "F" Exs. 3-A, 4-1, 4-2; R. 3584-86, 3620-26,

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detrimentally effected by the permanent injunction entered against her.

[14] On 10 April 1996, the 14th Dallas State Judicial District Court dismissed, with prejudice, the Investors' claims against, in part, Johnston. The state court dismissed the Dallas County suit, because the district court had denied the PIP Partners/Albertson Fed.R.Civ.P. 60b(5) motions; that is, despite the state court's knowledge that PIP Partners and Albertson had appealed the district court's denial of their motions. (App'ts Rec. Excerpts "E").

By way of background, the associated Investors (as Quinn-L's assignees had filed *Quinn-L Capital Corporation, et al. v. Johnston., et al.*, Cause No. 91-13811-A, in the 14th District Court, Dallas, Dallas County, Texas. Those claims had grown out of the sanctioned conduct of Quinn-L's *Tilley* counsel, appointed by Royal, in *Atkinson*.

3627-29 [Vol. 16]). The unincorporated association/partnership jointly received, through their attorneys, the assignment of claims from Quinn-L. (App'ts Rec. Excerpts "F" Exs. 4-1, 4-2, R. 3620-26, 3627-29 [Vol. 16]).

B. The District Court: No Ancillary Jurisdiction Over the Post-*Royal I* Declaratory Judgment Torts

The district court had grounded its jurisdiction for permanently enjoining the investor partnership from prosecuting Royal's post-declaratory judgment torts upon ancillary jurisdiction. (App'ts Rec. Excerpts "F" Ex. 1; R. 3570-72 [Vol. 16]). To reiterate, the Fifth Circuit subsequently ruled that the district court did not have ancillary jurisdiction by which to determine any issues with respect to claims against Royal for its post-declaratory judgment tortious conduct.[15]

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[15] *See Royal Ins. Co., of Am.*, 3 F.3d at 881; *accord cf. Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S.Ct. 1673, 1675-76 (1994). In *Royal Ins. Co. of Am.*, the Fifth Circuit determined that under the Anti-Injunction Act, the district court: (a) had no jurisdiction beyond that required to have enforced its earlier *Royal I* declaratory judgment; and (b) was without ancillary jurisdiction to have determined the parties' rights with respect to the post-declaratory judgment torts. *Id.* Apparently, assuming incorrectly subject matter jurisdiction based upon diversity of citizenship, the district court has never modified its injunction and refused to do so on motion. Thus, this appeal follows.

C. The District Court: No Alternative Jurisdictional Source Under 28 U.S.C. § 1332

The district court had alternatively claimed subject matter jurisdiction under 28 U.S.C. § 1332, requiring the complete diversity of citizenship between all plaintiffs and defendants at the time of *Royal II's* filing.[16] (App'ts Rec. Excerpts "F" Ex. 1; R. 3570-72 [Vol. 16]). However, complete diversity did not exist between Royal and the unincorporated association of Investors. Therefore, as the district court was without any independent jurisdictional basis (neither ancillary nor complete diversity), it never had subject matter jurisdiction by which to have enjoined the unincorporated association (not sued by Royal), PIP Partners, Albertson, or the other Investors/unincorporated association members/partners from pursing [sic] the unincorporated association's state court actions for Royal's post-*Royal* (declaratory judgment) torts. *See generally Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (subject matter jurisdiction may not be waived, and district court "**shall** dismiss" action whenever it appears that court ***blacks*** such jurisdiction) (emphasis added).

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[16] *See Aetna Casualty & Surety Co. v. Hillman*, 796 F.2d 770, 775-776 (5th Cir. 1986) (diversity must exist at time suit filed).

1. To have effectuated *Royal I's* declaratory judgment, Royal was required to have sued the real party to the controversy, the owner of Quinn-L's assigned rights

a. The unincorporated association/partnership, the real party to the controversy

Only the unincorporated association/partnership[17] owned Quinn-L's assigned rights against Royal. No Investor, individually, received or held any of the assigned rights. Each Investor possessed derivative, jointly-held rights, only. (App'ts Rec. Excerpts "F" Exs. 3-A, 4-1, 4-2, R. 3584-86, 3620-26, 3627-29 [Vol. 16]). *See*, Tex. Rev. Civ. Stat. art. 6132b, § 6 (two (2) or more persons' association to carry-on as co-owners a business for profit, a partnership). Thus, to have properly enforced its first declaratory judgment, Royal was required to have sued the owner of Quinn-L's assigned rights, the unincorporated association/partnership. This, Royal refused to do, and the district court ignored Royal's failure. *See Bankston v. Burch*, 27 F.3d 164, 167-68 (5th Cir. 1994)

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[17] Although disregarded by the district court, the partnership conformed to the requirements of Tex.Rev.Civ.Stat.Ann. art. 6132b *et seq.* (Vernon 1970), because on a prorata basis, the general partners agreed to share recoveries/expenditures in prosecuting the Quinn-L assigned claims against Royal and Johnston. (App'ts Rec. Excerpts "F" Exs. 4-1, 4-2; R. 3620-26, 3627-29 [Vol. 16]). Indeed, the general partners formed the partnership to prosecute a single adventure; *i.e.*, the assigned claims owned by the association of Investors. *See generally Vick v. George*, 671 S.W.2d 541, 547 (Tex. App. – San Antonio 1983), *rev'd on other grounds*, 686 S.W.2d 99 (Tex. 1984).

(partnership holding rights, from which individual partner's claims derived, indispensable) (citing with approval, *Buckley v. control Data Corp.*, 923 F.2d 96, 97 (8th Cir. 1991), for proposition that partners' derivative claims rendered partnership indispensable; thus, each partner's citizenship determined diversity jurisdiction); *see also Shell W.E. & P., Inc. v. Dupont*, 152 F.R.D. 82, 84-85 (M.D. La. 1993) (51 remaining land tract co-owners, indispensable in lessees' diversity suit for ownership rights declaration) (as absent co-owner non-diverse, dismissal required) (federal court found no reason for Shell not seeking declaration in state court); *see generally Taormina Corp. v. Escobedo*, 254 F.2d 171, 174 (5th Cir.), *cert. denied*, 358 U.S. 827 (1958) (applying Texas law) (citations omitted).

The district court also ignored that all of the Investors, as a mere collection of persons and entities, formed an unincorporated association. Indeed, by the assignment's express terms, the Investors, jointly, were assignees of Quinn-L's rights against Royal. Further, Cranfill's September 1990 affidavit, filed with PIP Partner's motion to dismiss, placed Royal and the district court on express notice that the Investors jointly held their assigned rights. (App'ts Rec. Excerpts "F" Ex. 3-A, "J" Ex. A, R. 3584-86, 3672-84 [Vol. 16]). *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) (citing *Great S. Fireproof Hotel Co., v. Jones*, 177 U.S. 449, 456 (1990), regarding limited partnership association and characterization thereof as no more than a "mere collection of individuals"); *Assoc. Students of Univ. of CA. v. Kleindienst*, 60 F.R.D. 65, 67 (C.D.Cal. 1973) (unincorporated association," . . . voluntary group of persons, without [c]harter

formed by mutual consent for [p]urpose of promoting [c]ommon enterprise or prosecuting [c]ommon objective . . . "); *Hutchins v. Grace Tabernacle United Pentecostal Church,* 804 S.W.2d 598, 599 (Tex. App. – Houston [1st Dist.] 1991, no writ) (unincorporated association, voluntary group of persons formed by mutual consent for purpose of promoting common enterprise); *see also cf. Holberg & Co. v. Citizens Nat'l Assur. Co.,* 856 S.W.2d 515, 517 (Tex.App. – Houston [1st Dist.] 1993, no writ) (in suit against unincorporated association, any judgment rendered against association is conclusive as to its members) (citing *Cox v. Thee Evergreen Church,* 836 S.W.2d 167, 169 (Tex. 1992), for proposition that unincorporated association has no existence apart from individual members).

Further, and as reflected by the assignment and the uncontroverted affidavits of Messrs. Boyd and Swift, the Investors (including PIP Partners and Albertson) formed an unincorporated association/partnership for the single purpose of prosecuting the assigned claims from Quinn-L. (App'ts Rec. Excerpts "F" Exs. 4-1, 4-2; R. 3620-26, 3627-29 [Vol. 16]). Each Investor was thus an incorporated association member/general partner, as none individually received or owned any of Quinn-L's assigned rights. (App'ts Rec. Excerpts "F" Ex. 3-A; R. 3584-86 [Vol. 16]). Rather, as a group, all 157 members jointly shared an undivided interest in the assigned claims. *(Id.).* The unincorporated association/partnership owned the assigned rights from which each member's claims jointly derived. Hence, the unincorporated association/partnership was the only real party to the controversy as to the post declaratory judgment torts. *See Carden v. Arkoma Assoc.,* 494 U.S. 185, 187 n.1 (1990) (question of which parties to

consider for determining diversity jurisdiction, answered by application of "real party to the controversy test") (multiple respondents were not before court; instead, only one – the entity, "Arkoma Associates"); *Navarro Sav. Ass'n*, 446 U.S. at 451; *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 385 (1922) (unincorporated association, having no character other than partnership, could only be sued in its members' names and liability against it could only be enforced against each member); *Cates v. Int'l Tel. & Tel. Corp.*, 756 F.2d 1161, 1173 (5th Cir. 1985) (cause accruing to partnership is partnership property); *Cox*, 836 S.W.2d at 169 (unincorporated association, no existence apart from individual members); *Burton v. Grand Rapids School Furn. Co.*, 10 Tex. Civ. App. 270, 31 S.W. 91, 92 (Civ. App. – 1895, no writ) (when association organized and conducted for profit, treated as partnership); *William V. Dorsaneo*, Tex. Lit. Guide § 190.02 (1992) (association members, no individual legal interest in property, because held jointly/collectively).

b. No magic words required – the Quinn-L assignment was to a collection of unincorporated persons and entities

In its 12 January 1996 order, the district court claimed that *Bankston* did not apply to these facts because, allegedly, there was no partnership at bar.[18] (App'ts Rec.

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[18] In reality, the unincorporated association was also a partnership, because the general partners shared recovery/expenditures in prosecuting the post-assignment claims against Royal and Randy Johnston on a prorata basis. *See* Tex.Rev.Civ.Stat. art 6132b, *et seq.*; *see also* (App'ts Rec. Excerpts

Excerpts "B," p. 5; R. 3795 [Vol. 16]). The district court so-ruled, because the Quinn-L assignment did not reflect any of the magic terms for which the court was apparently searching; *i.e.*, according to the district court, no partnership existed, because the assignment's language did not "suggest": (a) the formation of the unincorporated association/partnership; or (b) that the unincorporated association/partnership was a party to the action.[19] (App'ts Rec. Excerpts "B"; R. 3795 [Vol. 16]). In this regard, the district court ignored Cranfill's September 1990 affidavit.

"F" Exs. 4-1, 4-2; R. 3620-26, 3627-29 [Vol. 16]). Simply by the assignment, Quinn-L granted, transferred, sold, conveyed, assigned and quit-claimed to the Investors and their heirs and/or assigns, any and all claims or causes of action against, among others, Royal. (App'ts Rec. Excerpts "J" Ex. A; R. 3672-84 [Vol. 16]). In its ruling the district court virtually ignored the unincorporated associations' unalterable existence; choosing, instead, to improperly address only the partnership subset. (App'ts Rec. Excerpts "B"; R. 3791-97 [Vol. 16]).

[19] The court's reasoning was flawed, because: (a) on 9 March 1990, Royal filed *Royal II*, and Quinn-L answered on 15 April 1990; (b) Quinn-L assigned its rights against Royal to the Investors on 4 September 1990; (c) thereafter, but also on September 4th, the associated Investors filed the Cameron County damages suit for Royal's post-declaratory judgment torts; and (d) Royal joined each associated Investor in *Royal II* on 27 September 1990. (App'ts Rec. Excerpts "F" Exs. 3-A; R. 3584-3618; "J" Exs. A & C, R. 3672-84, 3697-3712 [Vol. 16]; R. 001, Vol. 10; "A-5" Ex. 20; "A-6" Ex. 4). Simply, the assignment actually created the association. Only thereafter, did the associated Investors file the Cameron County damages suit. In the same hand, Royal did not join each of the associated Investors until several weeks after the unincorporated association's creation via the assignment.

Despite the district court's misperception, the assignment's express terms (coupled with Cranfill's filed September 1990 affidavit) revealed that a collection of persons/entities jointly received Quinn-L's rights to pursue Royal and others; thereby placing Royal and the district court on specific written notice that each Investor, jointly, had become an assignee of Quinn-L's rights against Royal and others.[20] (App'ts Rec. Excerpts "F" Ex. 3-A, "J" Ex. A; R. 3584-86, 3672-84 [Vol. 16]). At law, no more is required for the constitution of an unincorporated association. *See Navarro Sav. Ass'n*, 446 U.S. at 451; *Great S. Fire Proof Hotel Co.*, 177 U.S. at 456 (unincorporated association, "mere collection of individuals"); *United Mine Workers of Am.*, 259 U.S. at 385 (unincorporated association, no character other than partnership); *Varlotta Constr. Corp. v. Carla Dev. Corp.*, 886 F. Supp. 315, 317-18 (E.D.N.Y. 1995) (real party to controversy [joint venture comprised of 2 corporations] considered unincorporated association whose members' separate citizenship determined diversity); *Lowsley-Williams v. N. River Ins. Co.*, 884 F. Supp 166, 170-71 (D.N.J. 1995) (if not an

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[20] Nonetheless, to reiterate, the knowledge or not by the district court or Royal of the exact terms is a red-herring to the issue that, by the assignment's express terms and Cranfill's September 1990 affidavit, both Royal and the district court had notice that Quinn-L had assigned its claims against Royal and others to a collection of persons or entities who jointly held those rights. Such notice required the Court's jurisdictional inquiry regarding the citizenship of each of these persons and entities. Critically, no document or witness has indicated that Quinn-L's assignment of rights went, *in toto*, to any single Investor, because, instead, they were assigned to the unincorporated association/partnership.

incorporated group, all unincorporated groups likened to partnerships) (for diversity analysis, court must include each member's individual citizenship) (citing *Carden*, 494 U.S. at 190, 199); *Assoc. Students of Univ. of Ca.*, 60 F.R.D. at 67 (unincorporated association, voluntary group of persons formed by mutual consent to prosecute, an objective); *Cox*, 836 S.W.2d at 169; *Burton*, 31 S.W. at 92; *Holberg & Co.*, 856 S.W.2d at 517; *William V. Dorsaneo*, Tex. Lit. Guide § 190.02.

2. Royal's duty to have sued the real party to the controversy

The Investors had no duty to apprise Royal of the real party to the controversy, the unincorporated association/partnership. *See generally Matsushita Elec. Corp. of Am. v. McAllen Copy Data, Inc.*, 815 S.W.2d 850, 852 (Tex. App. – Corpus Christi 1991, writ denied) (under Texas law, no obligation to disclose that plaintiff should have brought suit against separate and distinct corporate entity). Royal, alone, had the burden to sue the correct party. *See Martin v. Wilkes*, 490 US. 755, 768 (1989) (plaintiff seeking relief, burden to choose those included in its suit); *Littleton, Colo. v. Comm. Union Assur. Co.*, 133 F.R.D. 159, 166 (D. Colo. 1990) (choosing forum and party-defendants, plaintiff could not complain about obtainable relief's scope). Further, Royal bore the burden to prove the existence of complete diversity, because it invoked the district court's jurisdiction on that basis. *See Elliott v. Tilton*, 62 F.3d 725, 727 n.4 (5th Cir. 1995), *on reh'g remanded*, 69 F.3d 35 (5th Cir. 1995) (citing *Kokkonen*, 114 S. Ct. at 1675 and *Stafford v. Mobil Oil Corp.*, 945 F.2d 803,

804 (5th Cir. 1991)). Here, Royal consciously and strategically selected the wrong party to sue. Indeed, Royal attempted to manufacture diversity jurisdiction by: (a) not suing the real party to the controversy, the association/partnership; (b) dismissing PIP Partners in an effort to influence the district court to disregard its citizenship; and (c) without suing it (much less identifying it), purposefully seeking an injunction that enjoined the unincorporated association which owned the rights being litigated.

The district court also complained that the assignment contained no language that the unincorporated association/partnership was a party to the action. To reiterate, however, the 4 September 1990 assignment created the association. In turn, Royal did not join each associated Investor until 27 September 1990. Further, the assignment's express terms identified all 157 Investors as assignees of Quinn-L's claims; that is, each and every Investor comprising the 157 total was, altogether, *the* unincorporated association which owned Quinn-L's assigned claims. Finally, once created, all 157 associated Investors filed the Cameron County damages suit on September 4th.

Royal bore the burden to make the unincorporated association a party. Because the assignment's express terms revealed that Quinn-L had assigned its rights to a collection of persons or entities, both the district court and Royal were on notice of the unincorporated association.[21]

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[21] Indeed, with leave from the district court, Royal had added PIP Partners as a party defendant with the remaining

Cranfill's September 1990 filed affidavit laid to rest any, *arguendo,* lingering doubts. (App'ts Rec. Excerpts "F" Ex. 3-A, "J" Ex. A; R. 3584-86, 3672-84 [Vol. 16]). Royal had no doubt about the entity to be sued; rather, only how to cloud and confuse the jurisdictional shortfalls.

Here, no individual partner owned any of Quinn-L's assigned claims, but rather jointly derived their rights (undivided interests) from the unincorporated association/partnership. (App'ts Rec. Excerpts "F" Ex. 3-A; R. 3584-86 [Vol. 16]). Hence, the unincorporated association/partnership was the real party to the controversy. *See Navarro Sav. Ass'n,* 446 U.S. at 460 & n.9 (federal court must rest jurisdiction upon citizenship of real parties to controversy).[22] As such, the separate citizenship of all 157

Investors in *Royal II.* Upon reviewing PIP Partners' dismissal motion filed on September 27th, Royal realized that, contrary to its allegations, the unincorporated association/partnership's presence had destroyed diversity by virtue of one of its member's (PIP Partners) non diverse citizenship. (App'ts Rec. Excerpts "F" Ex. 5; R. 3631-32 [Vol. 16]). Royal thus immediately sought to manufacture complete diversity by hurriedly filing a notice of PIP Partners' dismissal on 28 September 1990. (*Id.*).

[22] *See also cf. Aetna Casualty & Surety Co. v. Iso-Tex., Inc.,* 75 F.3d 216, 218 (5th Cir. 1996). There, Aetna Casualty & Surety Company (Aetna) had brought a declaratory judgment action for itself and other members of the American Nuclear Insurers (ANI). The court had granted final judgment in Aetna's favor, and no appeal was taken. Iso-Tex had counterclaimed against Aetna for various state causes. The court had granted summary judgment in Aetna's favor, and Iso-Tex had appealed. *Id.*

No party below had urged subject matter objections. However, the Fifth Circuit ruled that such failure did not relieve it of its duty to ascertain if the lower court could have properly taken jurisdiction. *Id.*

general partners (including the dismissed PIP Partners and never-sued Albertson) controlled the diversity issue. *See Carden*, 494 U.S. at 195-96 (to determine partnership or unincorporated association's citizenship, must consult that of each member); *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939) (diversity jurisdiction depends upon parties named, not whether plaintiff served them); *Bankston*, 27 F.3d at 167-68; *Whalen v. Carter*, 954 F.2d 1087, 1095 (5th Cir. 1992) (diversity jurisdiction in suit against partnership depended upon each partner's citizenship); *Elliott*,

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For purposes of diversity, the Court found Aetna to have been a "real and substantial part[y] to the controversy . . . ," citing *Navarro Sav. Ass'n*, 446 U.S. at 460, because it was a subscriber on the risk of the subject policy. In other words, Aetna, itself, had a stake in the case's outcome. The Court further found that ANI's naming as a party would have destroyed diversity, because it was an unincorporated association and at least one of its members was nondiverse to the plaintiff. *Id.* (citing *Carden*, 494 U.S. 185).

However, the Court ultimately held that ANI did not have to be a party, because Aetna had specifically brought the action as a member of ANI for itself and all other such association members (the unincorporated association). That is, according to the Court, Aetna was appearing in a representatives capacity under Fed.R.Civ.P. 23.2 (permitting action to be brought by members of unincorporated association as class by naming certain members or representative parties). *Id.*

Thus, considering the pleadings' express "posture," the ANI members, for jurisdictional purposes, were analogous to that of unnamed class members. As such, the Court disregarded their citizenship. *Id.* Nonetheless, implicit in the Court's analysis is that if Aetna had not been a Rule 23.2 representative, ANI would have been a real party to the controversy whose citizenship (due to a single member's nondiversity) would have destroyed diversity jurisdiction. *Id.; see also supra* at 28-33.

62 F.3d at 728 (court must consider unincorporated association, citizen of every state in which members reside).

3. Assuming, *arguendo*, that Royal had sued the real party to the controversy, to confirm diversity jurisdiction, the district court had to have separately considered the citizenship of all 157 unincorporated association members/general partners

As shown above, no unincorporated association member/general partner individually owned any of Quinn-L's assigned claims, but rather derived their rights (undivided joint interest) from the unincorporated association/partnership. (App'ts Rec. Excerpts "F" Ex. 3-A, 4-1, 4-2, "J" Ex. A; R. 3584-86, 3620-26, 3627-29, 3672-84 [Vol. 16]). Thus, the unincorporated association/partnership was the real party to the controversy (post-declaratory judgment torts), because it owned the assigned claims. *See Carden*, 494 U.S. at 195-96; *Navarro Sav. Ass'n*, 446 U.S. at 460-63 & n.9 (federal court must rest jurisdiction upon citizenship of real parties to controversy); *Carden*, 494 U.S. at 195-96; *United Mine Workers of Am.*, 259 U.S. at 385 (unincorporated association, having no character other than partnership, could only be sued in its members' names and liability against it could only be enforced against each member); *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 304-07 (5th Cir. 1991) (citizenship of all of association's members determined diversity jurisdiction); *Cates*, 756 F.2d at 1173 (cause accruing to partnership as partnership property); *Cox*, 836 S.W.2d at 169; *Burton*, 31 S.W. at 92 (when association organized

and conducted for profit, treated as partnership); *Holberg & Co.*, 856 S.W.2d at 517.

Royal never sued the assigned claims' owner, the unincorporated association. thus, Royal had no right to any relief against the unincorporated association; more specifically, there was no basis upon which to have enjoined the never-sued unincorporated association from pursuing, via each member, the assigned claims for Royal's post-judgment torts. Yet, Royal's failure to sue the right party, coupled with its dismissal of the unincorporated association member PIP Partners, led the district court to ignore its duty to have separately considered the citizenship of all 157 unincorporated association members/general partnerships to ascertain diversity jurisdiction. *See Carden*, 494 U.S. at 195-96 (to determine partnership or unincorporated association's citizenship, court must consult that of each unincorporated association/partnership member); *Elliott*, 62 F.3d at 728; *Bankston*, 27 F.3d at 167-68 (partnership holding rights, from which individual partner's claims derived, indispensable and court must consider each partner's citizenship to determine diversity jurisdiction); *Whalen*, 954 F.2d at 1095 (diversity jurisdiction against partnership depended upon each partner's citizenship); *Sembach v. McMahon College, Inc.*, 86 F.R.D. 188, 191-92 (S.D.Tex. 1980) (for diversity purposes, unincorporated association without citizenship of its own) (court must look to each member's citizenship to determine diversity jurisdiction).

Royal pleaded federal jurisdiction over the post-declaratory judgment parties and claims based upon: (a) complete diversity; and (b) ancillary jurisdiction. When faced with express notice that diversity (via PIP Partners'

motion to dismiss) did not exist, Royal took the back-up position that Quinn-L's assignment to the Investors (including PIP Partners as the nondiverse joint assignee) allegedly did not effect the court's jurisdiction. (App'ts Rec. Excerpts "Q" Ex. B; R. 3760-61 [Vol. 16]). As well, Royal never addressed the citizenship of the association of Investors (App'ts Rec. Excerpts "J" Ex. C; R. 3697-3700 [Vol. 16]). Royal's disregard of the Investors' association as the real party to the controversy caused the court to disregard the common citizenship of PIP Partners, a member whose citizenship had to be considered.[23]

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[23] Neither Albertson, PIP Partners nor the unincorporated association/partnership were *Royal II* litigants. *See generally Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("elementary" that one not bound by *in personam* judgment if never named or made a party by service of process). Further, in its findings of fact, the district court determined only that neither Royal Plaintiff was a citizen of any state (Louisiana and Texas) whose citizenship was common solely to that of the joined Investors. (App'ts Rec. Excerpts "F" Ex. 1; R. 3571 [Vol. 16]). This finding was not one as to the association's citizenship for diversity purposes.

Additionally, the district court ruled that PIP Partners' joinder would not deprived it of subject matter jurisdiction, because, *arguendo*, it possessed ancillary jurisdiction (that is, irrespective of diversity considerations) to enforce *Royal I's* judgment. (App'ts Rec. Excerpts R. "F" Ex. 1; 3571 [Vol. 16]). Ultimately, the Fifth Circuit denied the availability of ancillary jurisdiction over the post-*Royal I* declaratory judgment claims. *See Royal Ins. Co. of Am.*, 3 F.3d at 881; *accord Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (court may not extend ancillary to plaintiff's cause against nondiverse citizen); *Peacock v. Thomas*, 116 S. Ct. 862, 867-68 (1996) (primary lawsuit must contain independent basis for federal jurisdiction).

D. Royal's Manufacturing of Diversity Jurisdiction

1. Methods available to a plaintiff conducting litigation involving an unincorporated association

Three (3) procedures exist by which a plaintiff may conduct litigation involving an unincorporated association. These methods are:

a. **First method:** If the unincorporated association has, under state law, the capacity to defend a lawsuit as a jural entity, a plaintiff may sue the unincorporated association under its common name. *See 7C Charles A. Wright & Arthur R. Miller,* Fed. Prac. & Proc. § 1861, at 214 (1986).[24] Further, if a plaintiff sues in federal court to seek enforcement of rights under the Constitution or United States laws, Fed.R.Civ.P. 17(b) permits an action against an unincorporated association in its common name, regardless of whether the relevant state law grants the association jural entity status. *See Id.* However, if a plaintiff sues the unincorporated association and bases jurisdiction solely upon diversity of citizenship, Fed.R.Civ.P. 17(b) requires the forum state's law to govern the association's capacity to defend. *See Id.*

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[24] In Texas, unincorporated associations have the capacity to defend lawsuits as jural entities. *See* Tex.Rev.Civ.Stat.Ann. art. 6133 (Vernon 1970) (unincorporated association may be sued in its common name in any Texas court having subject matter jurisdiction) (not necessary to make individual members parties).

b. **Second method:** The second method for conducting litigation involving an unincorporated association is the plaintiff's joinder of all members as defendants. *See Id.* at 215. By so-choosing, the plaintiff has necessarily adopted the notion of an unincorporated association as a group of individuals voluntarily linked in a matter that creates common rights and liabilities. *See Id.*

c. **Third method:** Finally, a plaintiff may use a class action with specifically named representatives of the association under Fed.R.Civ.P. 23.2. *See Id.* The plaintiff would typically institute suit against only a few designated persons as representatives of the class of associated members who are too numerous to make joinder of every individual feasible. *See Id.*

The method chosen by a plaintiff carries significant ramifications such as, for example, effecting the federal court's subject matter jurisdiction. Thus, for purposes of diversity jurisdiction, an unincorporated association has no citizenship of its own. *See Id.* at 217. Hence, if a plaintiff brings suit against the individual associated members, the organization's citizenship is deemed to be that of its members. *See Id. (e.g., Lowry v. Int'l Brotherhood of Boilermakers of Iron Shipbuilders & Helpers of Am.*, 259 F.2d 568, 570-73 (5th Cir. 1958)). Under such circumstances, complete diversity requires evaluation of the citizenship of each member. *See Id.* at 217-18.

On the other hand, if a plaintiff sues an unincorporated association in a class action, the class' citizenship is considered to be that of the named representatives, only.

Generally, the representatives can be chosen by the plaintiff to ensure complete diversity. *See Id.* at 218 *(e.g., Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 365-66 (1921); *Kerney v. Ft. Griffin Fandangle Ass'n, Inc.,* 624 F.2d 717, 720 (5th Cir. 1980); *Calagaz v. Calhoun,* 309 F.2d 248, 251-52 (5th Cir. 1962); *Lowry,* 259 F.2d at 570-73); *see also Aetna Casualty & Surety Co.,* 75 F.3d at 218 (because plaintiff had specifically brought suit for itself and in a representative capacity for all other association members, court did not have to "count" nondiverse member's citizenship).

2. Royal chose the second method

Royal chose to join each of the 157 associated members as individual party-defendants in *Royal II,* or the second method.[25] Thus, for diversity purposes, the unincorporated association's citizenship was deemed to have been the same as that of each of its members. *See Lowry,* 259 F.2d at 570-73. Therefore, complete diversity of each associated Investor was required. *See Carden,* 494 U.S. at 190 (citizenship of all unincorporated association members taken into consideration in determining diversity jurisdiction); *Elliott,* 62 F.3d at 727 n.4, *on reh'g remanded,* 69 F.3d 35.

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[25] To reiterate, however, while Royal named all of the associated Investors, it: (a) never served various of them, such as Albertson; and (b) subsequently dismissed the nondiverse associated member, PIP Partners. (App'ts Rec. Excerpts "F," "J," "O," "Q" & "T"; R. 3551-3634, 3656-3725, 3738-67, 3769-85, 3798-3805 [Vol. 16]).

3. Royal's sham: Not eliminated by "virtual representation"

In *Royal II*, Royal initially joined each Investor only as individual judgment creditors of Quinn-L. (R. "A-5" Ex. 16, pp. 2, 4-5). Thereafter, Royal attempted to manufacture diversity jurisdiction by dismissing the non-diverse associated member, PIP Partners. Yet, the established law is clear; because Royal brought suit under the second option (against individual association members), each member's complete diversity of citizenship was required. *See Carden*, 494 U.S. at 190; *Elliott*, 62 F.3d at 727 n.4, *on reh'g remanded*, 69 F.3d at 36.

Further, Royal never postured its pleadings as a class action under Fed. R. Civ. P. 23.2 (third method), and the court never certified the suit as such. Finally, Royal never sued the unincorporated association as an entity (first method); that is, despite Texas law permitting it to do so. *See* Tex. Rev. Civ. Stat. Ann. art. 6133. Indeed, and notwithstanding their express notice of the unincorporated association's existence since in or about September 1990, both Royal and the district court disclaimed any such knowledge. Simply, both Royal and the court have unfalteringly characterized the associated Investors as having been joined, individually, as Quinn-L's judgment creditors. (App'ts Rec. Excerpts "B"; R. "A-5" Ex. 16, pp. 2, 4-5).

In its January 1996 order, the district court claimed that it need not have considered the citizenship of PIP Partners for diversity purposes, because it decided on 20 December 1991, that PIP Partners was not indispensable.

(App'ts Rec. Excerpts "B," p. 3-4; R. 3793-94 [Vol. 16]).[26] This focus misses the key issue. On December 20th, the district court had ruled that PIP Partners was dispensable, because Quinn-L and/or the remaining Investors virtually represented its interests. (R. 2647/1048).[27] *But see Elliott*, 69 F.3d at 36 (unincorporated religious association/church, real party to controversy) (plaintiffs had to choose if wanted action against unincorporated church, because if they did, no diversity jurisdiction existed) (plaintiffs could not hold unincorporated church liable, but at same time dismiss some members to create diversity jurisdiction); *Travelers Indem. Co. v. Dingwell*, 691 F. Supp. 503, 507-08 (D. Me. 1988) (insured-assignor could not adequately represent assignees' interests).

The district court's reasoning regarding jurisdictional requisites was incorrect. First, *Royal II* was not about, for example, multiple tortfeasors where Royal could have chosen who it desired to sue. *See generally Nottingham v. Gen. Am. Comm. Corp.*, 811 F.2d 873, 880 (5th Cir.), *cert.*

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[26] Again, the district court ignored the citizenship of any unjoined Investor named by Royal in *Royal II*.

[27] To reiterate, Royal had joined PIP Partners to *Royal II*; only to dismiss it upon realizing when served with PIP Partner's motion to dismiss, that its presence destroyed diversity. (R. 444). PIP Partners was denied access to *Royal II*. Indeed, all 157 Investors (including PIP Partners) were also denied access to *Royal I*, as the court denied their requested intervention on two (2) separate occasions. (R. "A-5" Ex. 13; SJ Ex. "3-LL"). *See generally Benson v. Anderson*, 899 S.W.2d 272, 276 (Tex. App. – Houston [14th Dist.] 1995, writ denied) (under Texas law, party severed and denied intervention cannot be bound by judgment).

denied, 484 U.S. 854 (1987) (joint tortfeasors, not indispensable). Here, Royal had no choice as to who it had to sue in order to effectuate *Royal I's* judgment. That is, Royal had to sue the owner of Quinn-L's assigned claims, the unincorporated association/partnership and real party to the controversy. Thus, the district court had no choice but to consider the citizenship of each of the 157 unincorporated association members/partners, including PIP Partners. *See Elliott*, 69 F.3d at 36; *Elliott*, 62, F.3d at 728; *Cox*, 836 S.W.2d at 169; *Burton*, 31 S.W. at 92; *Holberg & Co.*, 856 S.W.2d at 517; *William V. Dorsaneo*, Tex. Lit. Guide § 190.02.

Royal chose to: (a) not serve named members, such as Albertson; (b) dismiss association member, PIP Partners; and (c) not sue the association itself under Fed.R.Civ.P. 23.2. Instead, Royal used "virtual representation" as a device by which to pretextualy create diversity jurisdiction. *See generally Kerney*, 624 F.2d at 720 n.6 (had Kerney attempted to sue association as an entity, would have had to show citizenship of each member, "to be sure") (Fed.R.Civ.P. 23.2 "created new avenue" to establish diversity jurisdiction against an association when its members' citizenship not alleged) (defendants did not contend and Court did not decide if party used Rule 23.2 class action, rather than entity suit, as a device to select diverse parties as named class representatives and thereby create jurisdiction); *Northbrook Excess & Surplus v. Medical Malpractice*, 900 F.2d 476, 479 (1st Cir. 1990) (in *Kerney*, no allegation of manufacturing diversity by bringing class action suit instead of entity suit only as device to create jurisdiction).

Despite Royal's ploy, the district court still had to consider, whether never sued or dismissed, the separate citizenship of all 157 associated members or partners. Simply, regardless of any alleged virtual representation of PIP Partners (or of any other non-joined unincorporated association member/general partner) by either Quinn-L or the remaining associated Investors, the district court remained duty-bound to evaluate the separate citizenship of all 157 unincorporated association members/general partners, whether joined or not. Why? Because the unincorporated association/partnership was the real party to the controversy.[28] *See Navarro Sav. Ass'n*, 446 U.S. at 46;

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[28] Even assuming, *arguendo*, that the district court did not, for diversity purposes, have to consider each Investor's individual citizenship (which it did), the doctrine of "virtual representation" is but an exception to *res judicata's* "mutuality" requirement which, under narrow circumstances, binds a nonparty to a court's order. *See generally Harris Trust & Sav. Bank v. Energy Assets Int'l Corp.*, 124 F.R.D. 115, 117 (E.D. La. 1989). The doctrine's application depends upon the fact that not all or any of the members of the group are now ascertainable. Hence, if membership proves undeterminable, the group, if at all, could participate only through virtual representation. *See Matthies v. Seymour Mfg. Co.*, 270 F.2d 365, 371 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960); *see also Robinson v. Nat'l Cash Register Co.*, 808 F.2d 1119, 1124 (5th Cir. 1987) (corporation was alter ego of plaintiffs; thus, previous judgment against only the latter nonetheless bound corporation as individuals had "virtually represented" entity in prior suit). Here, every member of the association was known to Royal and the district court.

However, even if an unascertainable group could be virtually represented, such would not eliminate a court's duty to first determine diversity jurisdiction. *See Matthies*, 270 F.2d at 375 ("virtual representation" whereby one represents other members of an unascertained group, not applicable to justify

Carden, 494 U.S. at 195-96; *Elliott*, 69 F.3d at 36; *Elliott*, 62, F.3d at 727 n.4. Therefore, as Royal's relief was sought from parties who did not own the rights in dispute, the relief dispensed could not be structured to subvert constitutional jurisdictional "bedrock." *See Elliott*, 69 F.3d at 36. The unincorporated association must be set free to pursue its rights in the still pending Texas state court actions.

II. *Res Judicata:* No Bar to the PIP Partners/Albertson Fed. R. Civ. P. 60b(5) Motions

In its January 1996 denial, the district court found that the Investors were barred from relitigating whether PIP Partners was an indispensable party, because on 20 December 1991, it had ruled that PIP Partners was not dispensable. (App'ts Rec. Excerpts "B," p. 3-4; R. 3793-94 [Vol. 16]). Again, the court's reasoning was flawed, because "indispensability" as it related to whether PIP Partners could be bound by the court's injunction through its alleged virtual representation by joined Investors and/or Quinn-L, was not the issue. Rather, the district court's focus should have been that, because the unincorporated association/partnership was as the true and only owner of Quinn-L's assigned rights, it was the real party to the controversy. As such, the district court

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absence of parties whose status already ascertained) ([here, group already ascertained; *i.e.*, the 157 unincorporated association members/general partners, including PIP Partners and Albertson]); *see also United Steelworkers of Am. v. Bouligny*, 382 U.S. 145, 150-51 (1965) (labor union could file suit in its own name and represent its members' interests, but court had to rely on each member's citizenship to determine diversity).

had no choice but to have included PIP Partners' (nondiverse) citizenship in determining diversity jurisdiction. *See Navarro Sav. Ass'n*, 446 U.S. at 460-63 & n.9 (federal court must rest jurisdiction upon citizenship of real party to controversy); *Great S. Fire Proof Hotel Co.*, 177 U.S. at 456; *United Mine Workers of Am.*, 259 U.S. at 385; *Carden*, 494 U.S. at 195-96; *Tilton*, 69 F.3d at 36; *Cates*, 756 F.2d at 1173; *Elliott*, 62 F.3d at 728; *Assoc. Students of Univ. of Ca*, 60 F.R.D. at 67; *Sembach*, 86 F.R.D. at 191-92. Simply, the issue was not whether other members of the unincorporated association had similar interests or attorneys. Otherwise, *stare decisis* would be rendered meaningless on this well-developed jurisdictional concept, repeatedly confirmed at the highest federal levels. The citizenship of each member mattered. So sayeth the law.

Further, the district court determined only that neither Royal plaintiff was a citizen of any state (Louisiana and Texas) whose citizenship was common solely to that of the joined Investors. (App'ts Rec. Excerpts "F" Ex. 1; R. 3571 [Vol 16]). Therefore, the district court never decided, considered or determined: (a) the unincorporated association/partnership's citizenship; and (b) Royal's Illinois and New York citizenship which was nondiverse with the unincorporated association/partnership by virtue of PIP Partners' Illinois and New York citizenship.[29] (App'ts Rec. Excerpts "F" Ex. 3-A; R. 3584-86 [Vol. 16]). *See Kaspar Wire Works, Inc. v. Leco Eng'g & Machine, Inc.*, 575 F.2d 530, 536-37 (5th Cir. 1978) (only issue preclusion in declaratory judgment actions).

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[29] As well, *Royal I* had solely determined the extent of coverage, if any, under the Quinn-L policies.

III. PIP Partners and Albertson Timely Filed Their Fed. R. Civ. P. 60b(5) Motions

A. PIP Partners and Albertson Filed Their Motions Within a "Reasonable Time"

Albertson and PIP Partners requested relief, because: (a) it was no longer equitable for *Royal II's* final judgment to have prospective application; and (b) its terms were now inconsistent with the Fifth Circuit's then recent modification in decisional law. *See Elgin Nat'l Watch Co. v. Barrett,* 213 F.2d 776, 780 & n.11 (5th Cir. 1954) (Rule 60b(5) affords relief from final judgment where no longer equitable for it to have prospective application) (citing *U.S. v. Swift & Co.,* 286 U.S. 106, 114 (1932), for proposition that injunction always subject to adaptation as events may shape need) courts cannot disregard significant changes in law or fact if to do so would turn permanent injunction into "instrument of wrong"); *Valentine Sugars, Inc. v. Sudan,* 34 F.3d 320, 321 (5th Cir. 1994) (Rule 60b(5) allows court to grant relief from judgment where no longer equitable for it to have prospective application); *U.S. v. Georgia Power Co.,* 634 F.2d 929, 933-34 (5th Cir. 1981), *vacated on other grounds,* 456 U.S. 952 (1982) (in the Fifth Circuit, significant modification in decisional law permits court to prospectively modify permanent injunction) (citing *Sys. Fed'n No. 91, Ry. Employees' Dept. v. Wright,* 364 U.S. 642 (1961) and *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424 (1976), for proposition that Supreme Court has given "strong indications" that court should modify injunction based on change in case law); *Johnson Waste Materials v. Marshall,* 611 F.2d 593, 600 (5th Cir. 1980) (Rule 60b, as recognized by Fifth Circuit,

should be "liberally construed to do substantial justice") (Fifth Circuit citations omitted).

B. Under *Bankston*, Royal Could Not Manufacture Diversity

A Rule 60b(5) motion may be brought within a "reasonable time." *See Georgia Power Co.*, 634 F.2d at 933; *Johnson Waste Materials*, 611 F.2d at 600 (Rule 60b(5) motions need only be brought within "reasonable period"). Here, the PIP Partners/Albertson motions were timely, because they were brought within a reasonable period. That is, the Fifth Circuit did not render its significant decisional law modification until July 1994, less than one year from the time of PIP Partners' motion. (App'ts Rec. Excerpts "F"; R. 3551-3634 [Vol. 16]). Moreover, the Fifth Circuit's opinion was not published until several months thereafter.

On 29 July 1995, *Bankston* held that a party could not manufacture diversity. *See Bankston*, 27 F.3d at 167-68. That is, Royal could not manufacture diversity by failing to sue the unincorporated association/partnership; thereby avoiding the required "counting" of the citizenship of each individual unincorporated association/general partner. Notwithstanding Royal's ruse, the district court was nonetheless required to have considered, for diversity jurisdiction purposes: (a) the citizenship of every unincorporated association member/general partner (including PIP Partners and Albertson); because (b) the unincorporated association/partnership was the real party to the controversy. *See Navarro Sav. Ass'n*, 446 U.S. at 46; *Carden*, 494 U.S. at 195-96; *Elliott*, 62 F.3d at 727 n.4.

Herein, Illinois and New York citizenships were common to Royal and the unincorporated association. (App'ts Rec. Excerpts "F" Ex. 3; R. 3580-83 [Vol. 16]). *Bankston*, 27 F.3d at 167-68, has now made evident Royal's attempt to manufacture complete diversity jurisdiction by: (a) never suing the unincorporated association/partnership; and (b) hurriedly dismissing that already joined, nondiverse member/partner, PIP Partners. *See Navarro Sav. Ass'n*, 446 U.S. at 46; *Carden*, 494 U.S. at 195-96; *Elliott*, 69 F.3d at 36; *Elliott*, 62 F.3d at 727 n.4. Moreover, as the real party to the controversy, the unincorporated association of Investors, has yet to be sued (although enjoined), no equitable justification exists for continuing the injunction or assigning any affect on its legal rights by a federal district court which never had subject matter or personal jurisdiction over it.

C. PIP Partners and Albertson Have Directly Attacked Royal's Manufacturing of Diversity Jurisdiction

The Rule 60b(5) motions of Albertson and PIP Partners are additionally timely, because they constitute direct, permissible attacks on Royal's manufacturing of diversity jurisdiction. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (subject matter determination, while not subject to collateral attack, always open to direct review); *Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953,

956 (5th Cir. 1991);[30] *Jordan v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (*res judicata*, no preclusion to direct attack under Rule 60b on judgment before rendering court); *Watts v. Pickney*, 752 F.3d 406, 410 (9th Cir. 1985) (*res judicata*, no preclusion to direct attack under Rule 60b for lack of jurisdiction) (direct attack on judgment one between parties to it seeking to correct, annul, reverse, vacate or declare such judgment void).[31] A court is always called upon to decide diversity citizenship. *See Carden*, 494 U.S. at 195-96 (citing *Great S. Fire Proof Hotel Co.*, 177 U.S. at 453, for proposition that party's failure to object to citizenship diversity until reached Supreme Court did not relieve Supreme Court from duty of ascertaining whether lower court had

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[30] Contrary to Royal's assertion regarding the alleged *res judicata* bar, *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1983 (5th Cir. 1992), held only that the issue of Royal Lloyds of Texas' state citizenship could not be collaterally attacked in a subsequent action.

[31] Key, neither the unincorporated association/partnership, PIP Partners nor Albertson were litigants in *Royal II*. As such, none had any opportunity to have fully challenged the court's lack of jurisdiction, by appeal or otherwise. *See Martin*, 490 U.S. at 764 (joinder as party, not mere knowledge of suit or opportunity to intervene, subjects party to court's jurisdiction and binds him to judgment). Rather, Royal: (a) never sued the unincorporated association/partnership; (b) named, but never served Albertson; and (c) dismissed PIP Partners, an unincorporated association member. Further, the court: (a) twice prohibited the associated Investors' *Royal I* intervention; and (b) determined only that neither Royal plaintiff was a citizen of the states (Louisiana and Texas) whose citizenship was common to the joined Investors. *See Kaspar Wire Works, Inc.*, 575 F.2d at 536-37 (only issue preclusion in declaratory judgment actions).

properly taken jurisdiction) (rule regarding diversity, inflexible).[32] Therefore, as diversity jurisdiction may not be waived, *Royal II* must be dismissed as to all matters beyond enforcing *Royal I*. *See Avitts*, 53 F.3d at 693.[33]

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[32] The district court should have reassessed its diversity jurisdiction at the time Royal filed its supplemental petition or, again, upon the filing of PIP Partners' motion to dismiss, containing the September 1990 Cranfill Affidavit. (App'ts Rec. Excerpts "F" Exs. 2 and 3; R. 3576, 3580-86 [Vol. 16]). *See Carlton v. Baww, Inc.*, 751 F.2d 785 (5th Cir. 1985) (jurisdiction reassessed when pleading amendment altered action's nature or added indispensable party); *Lewis v. Lewis*, 358 F.2d 495, 502 (9th Cir. 1966) (since, in amended pleadings, plaintiff stated no action against newly-joined corporate defendants until after obtaining nondiverse state citizenship, diversity jurisdiction never existed as to them).

[33] The Supreme Court in *Owen Equip. & Erection Co.*, 437 U.S. at 377, held that courts could not flaunt congressional mandate regarding diversity; that is, no extension of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same state in a diversity case. *See also Franchise Tax Bd. v. Constr. Laborer Vacation Trust S. Ca.*, 463 U.S. 1, 9-10 (1983) (declaratory judgment act neither repealed/modified otherwise existing jurisdictional requirements); *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) (court, no power by judicial fiat to extend jurisdiction over matter beyond authority creators granted); *Int'l Assoc. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996) (declaratory judgment act, not to expand federal jurisdiction); *Amco Constr. Co. v. Miss. State Bldg. Comm'n*, 602 F.2d 730, 733-34 (5th Cir. 1979) (Amco chose to rely on ancillary jurisdiction, but alleged district court's dismissal of its cross claim one and one-half (1 1/2) years later, as severely damaging) (Amco's stated "inequity" irrelevant, because waiver/estoppel could not confer federal jurisdiction) ("Amco . . . took the chance and lost"); *see also generally Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1950) (to permit judgment in removed case where court without original

CONCLUSION

Especially considering the unfair and continuing prejudice suffered by the unincorporated association of Investors in the Texas courts, including the recent dismissal of the Investors' state claims, the district court's denial of the PIP Partners/Albertson Fed. R. Civ. P. 60b(5) motions should be reversed, the extant orders and findings regarding Royal's post-declaratory conduct reversed and/or vacated, and the unincorporated association of Investors released from all judicial restraints on their rights to pursue the association's causes in the pending state courts which have jurisdiction over the parties and claims, and for such other and further relief to which Appellants are entitled.

Respectfully submitted,

BOYD & ASSOCIATES

/s/ Samuel L. Boyd P.C.
Samuel L. Boyd, P.C.
State Bar No. 02777500
Priscilla E. Perry
State Bar No. 15803700

13355 Noel Road, LB 87
One Galleria Tower, 21st Floor
Dallas, Texas 75240-6602
(214) 726-0204
(214) 726-0208 (FAX)

ATTORNEYS FOR APPELLANTS

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jurisdiction, worked wrongful extension of federal jurisdiction and gave power denied to court by Congress).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing matter has been served upon counsel for Appellees, on this 7 day of May, 1996.

/s/ Priscilla E. Perry
Priscilla E. Perry

APPENDIX E – BRIEF OF PLAINTIFFS-APPELLEES IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 25, 1996

96-10078

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ROYAL INSURANCE COMPANY OF AMERICA, *et al.*,

Plaintiffs-Appellees,

v.

QUINN-L CAPITAL CORPORATION, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

BRIEF OF PLAINTIFFS-APPELLEES

CHESTER J. HINSHAW
PATRICIA J. VILLAREAL
JONES, DAY, REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
(214) 220-3939

Attorneys for Plaintiffs-Appellees

BARBARA MCDOWELL
STEPHEN J. GOODMAN
Of Counsel

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROYAL INSURANCE COMPANY OF AMERICA, *et al.*,

Plaintiffs-Appellants,

v. No. 96-10078

QUINN-L CAPITAL CORPORATION, *et al.*,

Defendants-Appellees.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Royal Insurance Company of America and Royal Lloyds of Texas, plaintiffs-appellees.

2. The Royal Group, Inc., is the parent of Royal Insurance Company of America, as well as Royal Indemnity Company, Globe Indemnity Company, Safeguard Insurance Company, Newark Insurance Company and American and Foreign Insurance Company, all of which are defendants in the Brownsville, Texas actions brought by some of the defendants-appellants. Royal Lloyds, Inc., attorney-in-fact for Royal Lloyds of Texas, is also a defendant in Brownsville.

3. The law firm of Jones, Day, Reavis & Pogue, including attorneys Chester J. Hinshaw, Patricia J. Villareal, Glen D. Nager, Barbara McDowell and Stephen J. Goodman, counsel for plaintiffs-appellees.

4. The law firm of Thompson, Coe, Cousins & Irons, including attorneys Randy A. Nelson and David M. Taylor, counsel for plaintiffs-appellees.

5. The law firm of Carrington, Coleman, Sloman & Blumenthal, including attorneys Marvin S. Sloman and William D. Underwood, counsel for plaintiffs-appellees.

6. Quinn-L Capital Corporation, Quinn-L Financial Corporation, Quinn-L Equities, Inc., Quinn-L Management Corporation and Quinn-L Mortgage Company, defendants-appellants.

7. Mike Allen Adkisson, W.O. Akin, Gary R. Albertson, Jose L. Aliseda, Jerry H. Anderson, Lewis C. Barbe, Eileen Barbe, William J. Barrett, Jerome B. Bart, Bobby L. Bates, Steven J. Blackwell, E. William Boddeker, III, David G. Borman, Bowen Investments, Bronwyn Bowen, Bettie Bowen, William A. Bradley, Carla Nan Brooks Trust, Peter Brugger, Elena Brugger, Joseph E. Bruno, George T. Bryan, Charles B. Caldwell, Jr., J. Larry Caldwell, Mark N. Caracci, James Carrigan, Gloria Carrigan, George P. Catsulis, Jill E. Clarridge, Arthur Cobb, Paula Cobb, John J. Costanzi, Charles V. Court, Jr., Buford G. Crowley, Michael A. Cummins, Kenneth D. Cushman, Charles W. Daeschner, Jr., Elmer V. Dahl, Loyd F. Dale, D. William Davison, Keith D. Delatte, Jean Delatte, Marvin J. Descant, Warren F. Dodge, Edward L. Domingue, Grant A. Dove, William Dowhan, Alden W. Dudley, Jr., Donald G. Edgerton, Bobby Jack Estes, Charles J. Fagan, Elva

Falkenberg, Roy M. Fleniken, M. Wayne Flye, Emil F. Frey, Jose A. Fuentes, Perry L. Fulcher, Nick Funston, Jack W. Gamble, W. Gerald Gaudet, John W. Goodman, William J. Gribble, Dean O. Griffith, Jack L. Grindle, Edward B. Gripon, Richard S.C. Grisham, V. Bruce Hampton, Joseph S. Heard, Jorge Y. Herszage, Ross H. Hicks, O. Bryan Holland, Rodney Holley, Dianne Holley, Robert W. Hood, Michael J. Howell, Ted Huang, Richard W. Huye, Bonner H. Jackson, Edward E. Jackobson, Charles B. Joachim, F. Allen Johnston, Peter H. Jones, Andrew B. Jorden, Jr., Mrs. Eugene "Corrine" Karasewich, Richard L. Landry, H. Lee Leonard, Stephen C. Lesauvage, Edward E. Louis, Kenneth M. Lubritz, Milton H. Madeley, Jr., David V. Maraist, Mark D. Marshall, William H. Marshall, Jerard R. Martin, Daniel R. Martiny, Maxwell Luber Company, Stephen E. McElmurry, G. Walter McReynolds, Curtis C. Miller, Morris R. Mitchell, Charles F. Moseley, George W. Moss, III, Sidney Louis Mouk, Stephen J. Murdoch, Wilbur Gene Murff, Edgar P. Nace, Kenwyn G. Nelson, Norman P. Neureiter, John C. O'Brien, Jr., Michael G. Page, Mark A. Palmer, Otto A. Papp, Loree Papp, Charles D. Peterson, Jr., Jack W. Pou, Gerald F. Powell, Professional Investors Partnerships II, Michael A. Ramsay, Lorianne M. Reeves, Terry G. Rehn, Douglas H. Ridell, Newman L. Reichman, Nadine Reichman, J.B. Rochelle, III, Dan Salisbury, William C. Sandland, Jerome F. Scego, Jackie Scego, Russell W. Schroeder, Gail S. Schwinger, Cecil R. Simmons, William M. Simmons, A.O. Singleton, III, David A. Sirbasku, Donna M. Sirbasku, Mary Kay Smedstad, Thomas M. Smith, Simon Sonik, R. Malcolm

Stewart, Theodore B. Stubbs, James W. Swinnea, Jr., Antoinette C. Swinnea, Leonard E. Swischuk, James R. Tarrant, Sr., George E. Thomas, James C. Thompson, Jack A. Thurmond, Louis D. Tilotta, James L. Tucker, John A. Van De Wiele, James T. Walker, Joseph B. Walker, Paul A. Weber, Kurt G. Weiss, Craig Weisinger, Larry M. Wolford, Roger B. Yandell, Nancy J. Gribble, Paula Albertson and Mrs. William Boddeker, defendants-appellants herein and/or plaintiffs in the Brownsville lawsuits brought by some of the defendants-appellants. The partners in Professional Investors Partnership II are Dr. Patricia Blanton, Dr. James L.G. Cam, Dr. G. Lee Cranfill, Dr. D. William Davison, Dr. Anthony W. Gargiulo, Dr. J.M. Kochansky, Dr. Rodolfo Margo, Dr. Richard Phillips, Mrs. James S. Rogers, Dr. J. Daniel Subtelny, Dr. Jack A. Thurmond, and Mrs. Wilfred D. Whiteside.

8. The law firm of Boyd & Associates, including Samuel L. Boyd, Priscilla E. Perry and Mark W. Romney; Arthur R. Miller; the law firm of Edwards & Terry, including William R. Edwards and Michael G. Terry; and the law firm of R. Wayne Swift, Inc., including Wayne Swift, are and/or have been counsel for defendants-appellants.

9. S. Mark Lovell, sole voting shareholder of the Quinn-L entities designated above.

10. Dunn-Odom Insurance Agency, defendant in the Brownsville lawsuits brought by some of the defendants-appellants.

11. John M. Weaver, of counsel to defendants-appellants.

12. The law firm of McMains & Constant, including Rusty H. McMains; the law firm of Rodriguez, Colvin & Chaney, including Norton A. Colvin; [and the law firm of Vial, Hamilton, Koch & Knox, including Gayle Keahey,] counsel for the various Royal entities in the Brownsville lawsuits brought by some of the defendants-appellants.

/s/ Patricia J. Villareal
Counsel for Appellees
(BMcD)

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe that oral argument is necessary on this appeal from the district court's denial of relief from judgment under Fed. R. Civ. P. 60(b). The appeal does not present any important or complex issue for this Court's determination. It is nothing more than a transparent attempt to reopen a four-year-old judgment based on the absence of a supposedly "indispensable" non-diverse party – an issue that, as the district court found, appellants could have raised, but did not, prior to the entry of that judgment. Put simply, this appeal is a waste of the Court's time. There is no need to waste still more time by hearing oral argument.

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11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (2d ed. 1995) 13, 15, 25

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court acted within its discretion in denying appellants' motion for relief from judgment under Fed. R. Civ. P. 60(b)(5).

STATEMENT OF THE CASE

This is appellants' third, and most desperate, appeal in this "tangled web of litigation" that, as this Court observed, has been complicated and prolonged by appellants' attempts to "evade" federal jurisdiction. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1301 (5th Cir. 1992) ("*Royal I*"). It comes four years after the district court entered final judgment in this case, three years after this Court affirmed that judgment, and two years after the Supreme Court denied certiorari. It is both too little and too late.

A. Course Of Proceedings And Disposition Below

Appellees Royal Insurance Company of America and Royal Lloyds of Texas (collectively, "Royal") filed this action on March 9, 1990, in the United States District Court for the Northern District of Texas. (R.1-62 [Vol.1]). On July 1, 1992, the district court entered a final declaratory judgment in Royal's favor and enjoined the defendants and those in privity with them from relitigating any

of the issues decided by that judgment. (R.2917-34 [Vol.13]).[1] On September 27, 1993, this Court affirmed. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877 (5th Cir. 1993) (*"Royal II"*). The Supreme Court denied certiorari on April 18, 1994. *Quinn-L Capital Corp. v. Royal Ins. Co.*, 114 S. Ct. 1541 (1994).

On July 13, 1995, appellant Professional Investors Partnership II ("Professional Investors"), on behalf of itself and others, filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(5). It argued that complete diversity did not exist in this action and that the district court consequently lacked jurisdiction to enter judgment on some of the issues that it had decided. (R.2647-78 [Vol.12]). On December 5, 1995, appellant Paula Albertson ("Albertson") filed a similar motion. (R.A-8 Ex.95). On January 16, 1996, the district court denied both motions. (R.3791-97 [Vol.16]). Professional Investors, Albertson, and the others filed a Notice of Appeal on January 22, 1996. (R.3806-18 [Vol.16]).

B. Statement Of Facts

This case, now before this Court for the third time, arises from multiple lawsuits in both federal and state courts. Some of these suits date back nearly a decade.

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[1] "App'ts RE" refers to the record excerpts submitted by appellants. "R." refers to the record as marked by the district court clerk.

1. The Federal Investor Actions

During the 1970s and early 1980s, the Quinn-L entities ("Quinn-L") and their principal, S. Mark Lovell ("Lovell"), organized and promoted a number of real-estate limited partnerships. (R.39; 42 [Vol.1]; A-6 Ex.3 at 2).[2] In 1987, after the real-estate ventures had been foreclosed upon and Lovell had declared personal bankruptcy, Quinn-L was sued by 157 of its investors ("the Investors") in twenty-six separate actions filed in the district court. (R.2648-49 [Vol.12]). Those actions, which asserted claims under both federal and Texas law, were consolidated before Judge Sanders. (R.2649 [Vol.12]).

2. The First Federal Declaratory Judgment Action

In response to the federal investor actions, Quinn-L demanded that its liability insurer, Royal, assume its defense against the Investors' claims. (*Id.*) Royal did so, while reserving its right to contest coverage. (R.2649-50 [Vol.12]).

On May 10, 1988, Royal filed a declaratory judgment action against Quinn-L in the district court to establish that Royal's insurance policies did not impose any duty to defend or indemnify Quinn-L against the Investors' claims. (R.2649-51 [Vol.12]; A-6 Ex.16). This action was also assigned to Judge Sanders. (R.2650-51 [Vol.12]).

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[2] Lovell is the sole shareholder of every Quinn-L entity except Quinn-L Capital; as to Quinn-L Capital, he is the sole owner of its voting stock and the beneficial owner of all of its assets, if any. (R.2394-95 [Vol. 11]).

3. The Investors Negotiate With Lovell And Quinn-L

While the declaratory judgment action proceeded, the Investors negotiated with Lovell to settle their claims against him and Quinn-L. On April 3, 1989, the Investors and Quinn-L filed a joint motion to substitute the Investors' counsel for Quinn-L's counsel in the declaratory judgment action. (R.A-7 Ex.32). In the motion, they represented that they had "reached an agreement in principle for settlement of the Quinn-L Litigation." (*Id.* at 2-3).

The Investors also formally settled with Lovell, who agreed to "cooperate" with them in their litigation against Quinn-L. (R.K-1 Ex.2 at 12).

4. The Investors Dismiss Their Federal Actions

On August 3, 1989, the Investors moved to dismiss all of their pending actions against Quinn-L. (R.K-2 Ex.13). In this motion, the Investors again represented to the district court that they and Quinn-L had "reached an agreement in principle for settlement of [the Investors'] claims." (*Id.* at 2). On August 28, 1989, the district court granted the motion, dismissed the Investors' federal claims with prejudice, and dismissed the Investors' state claims without prejudice. (R.K-2 Ex.14; R.2651 [Vol.12]).

5. Royal Prevails In The First Declaratory Judgment Action

On April 14, 1989, the district court granted Royal's motion for summary judgment against Quinn-L in the

declaratory judgment action. The court held that Royal's policies provided no coverage for any of the claims made by the Investors against Quinn-L and that Royal had no duty to defend or indemnify Quinn-L with respect to those claims. (R.K-2 Ex.7). On September 8, 1989, the court entered final declaratory judgment in favor of Royal. (R.K-2 Ex.11). No appeal was taken from that judgment. (R.2651 [Vol.12]).

6. The Investors Prosecute The Adkisson Action In Dallas County Court

Five days later, on September 13, 1989, the Investors refiled their state-law claims against Quinn-L in Dallas County court in an action styled *Adkisson v. Quinn-L Capital Corp.* (R.K-2 Ex.16). Although the district court had already held that Royal had no duty to defend or indemnify Quinn-L in connection with such claims, Royal offered to defend Quinn-L under a reservation of rights. (R.K-1 Ex.5). Royal also retained attorney Coyt Randal Johnston to represent Quinn-L in *Adkisson*, and Johnston filed a general denial to the *Adkisson* complaint. (R.2652 [Vol.12]; R.K-2 Ex.18).

Lovell, on behalf of Quinn-L, refused to accept a defense from Royal unless Royal would acknowledge that its policies provided coverage for the Investors' claims. (R.2396-97 [Vol.11]). Royal reiterated that it would defend only if it could reserve its right to contest coverage and instructed Johnston to take no further action on Quinn-L's behalf. (R.K-1 Ex.8; R.2652 [Vol.12]; R.K-1 Ex.7]. Royal and Johnston also repeatedly notified Lovell and his personal attorney that they should retain counsel to replace

Johnston, but Lovell did not do so. (R.K-1 Ex. 12; R.K-2 Ex. 19).

On May 21, 1990, while Johnston's motion to withdraw was pending, the Investors served a total of 600 requests for admissions on the five Quinn-L defendants. (R.K-2 Ex. 20). Having been unable to contact Lovell on previous occasions and not wanting any unanswered requests to be deemed admitted by default, Johnston answered the requests, denying "by far the majority of them" (R.K-1 Ex. 27 at 126). Johnston advised Lovell of the requests for admissions, explaining that Lovell could amend the responses, if appropriate. (R.K-1 Ex. 14). Lovell replied that he had "no responsibility" for Quinn-L's defense in *Adkisson*, citing his earlier "settlement with the [Investor] plaintiffs represented by Sam Boyd." (R.K-1 Ex. 16).

On June 27, 1990, the Investors moved to strike Quinn-L's responses to the requests for admissions, asserting that Johnston had prepared them without consulting Quinn-L. (R.K-2 Ex. 23). Although Lovell was aware that the motion had been filed and was scheduled for hearing, he did not obtain counsel for Quinn-L, or ratify or amend the answers, or otherwise oppose the motion. (R.K-3 Ex. 29 at 9-10; R.C-4 at 262). On July 6, 1990, a visiting judge granted the Investors' unopposed motion to deem the denied requests "admitted." (R.K-2 Ex. 24).

The *Adkisson* action was called for trial on August 7, 1990. (R. 2652 [Vol. 12]). Lovell made no attempt to secure new counsel to represent Quinn-L at trial. As a result, the Investors obtained a default judgment against Quinn-L

for $741 million, although their alleged out-of-pocket investment losses were only $16 million. (R.K-2 Ex.25 at 1).[3]

7. Royal Files The Current Action

On March 9, 1990, while the *Adkisson* action was pending, Royal filed this action, seeking to enforce the district court's prior declaratory judgment. Royal requested a further declaration that it had no duty to defend or indemnify Quinn-L against the Investors' claims in *Adkisson*. (R. 1-61 [Vol. 1]).

On August 15, 1990, after the entry of the *Adkisson* default judgment, Quinn-L filed an answer in this action. Quinn-L not only disputed whether Royal's policies imposed a duty to defend and indemnify in *Adkisson*, but also asserted affirmative defenses alleging that Royal and its "agent" Johnston had tortiously mishandled the *Adkisson* litigation. (R. 121-28 [Vol. 1]). (These latter claims are referred to herein as the "post-declaratory judgment tort" claims.)

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[3] In their Statement of Facts, the Investors argue that Johnston engaged in "prohibited conduct" in *Adkisson* – such as filing the answer on behalf of Quinn-L and responding to the requests for admissions – that resulted in the entry of default judgment against Quinn-L. *See* Brief of Appellants ("App'ts Br.") at 6-8. These allegations are irrelevant to any issue presented by this appeal. Accordingly, rather than respond to the Investors' assertions on a point-by-point basis, Royal simply notes that both this Court and the district court have previously recognized that the *Adkisson* default judgment against Quinn-L was the product of collusion between Lovell and the Investors. *Royal I*, 960 F.2d at 1297-98.

8. Quinn-L Assigns Its Claims To The Investors

On September 4, 1990, Quinn-L, through Lovell, assigned whatever claims it might have against Royal to the Investors. (R. 3672-84 [Vol. 16]).

9. The Investors Sue Royal In Cameron County Court

Also on September 4, the Investors filed an action against Royal in Cameron County court in Brownsville. (R.K-3 Ex.26). In that action, they sought, "[a]s judgment creditors and assignees of the Quinn-L Entities," to hold Royal "responsible for the payment of the Judgment entered [in *Adkisson*]." (*Id.* at 14). They claimed that Royal was liable to them, under its policies, "for the entirety of the judgment rendered in *Adkisson*." (*Id.*) They also claimed that Royal had wrongfully denied coverage and an unconditional defense in *Adkisson* and had "hire[d] counsel whose conduct was the direct cause of the adverse judgment" in *Adkisson*. (*Id.* at 15-17). On the basis of these alleged post-declaratory judgment torts, the Investors demanded that they be awarded treble the *Adkisson* judgment – some $2.2 billion. (*Id.* at 18). On September 5, 1990, even before Royal was served with the complaint, the Investors obtained a trial date of December 10, 1990. (R.A-9 Exs. 104, 105).

Two weeks later, on September 17, 1990, the same Investors filed a second action in Cameron County court, seeking a declaration that Royal was liable directly to them for the *Adkisson* judgment. (R.K-3 Ex. 27). Once again, they asserted that the policies issued by Royal

provided coverage for the *Adkisson* judgment and that Royal's alleged post-declaratory judgment torts precluded it from denying coverage. (*Id.* at 11-12).

10. The District Court Denies Quinn-L's And The Investors' Motions To Dismiss For Lack of Diversity Jurisdiction

Royal moved the district court on September 4, 1990, for leave to join the Investors as defendants in this action. (R. 129-47 [Vol. 1]). In so doing, Royal noted that the Investors had become judgment creditors of Quinn-L (as a result of the judgment in *Adkisson*) and therefore had become "persons to be joined if feasible" within the meaning of Fed. R. Civ. P. 19(a). (R. 134; 141-44 [Vol. 1]).[4] On September 26, 1990, the court granted Royal's motion. (R. 275-76 [Vol. 2]).

On September 27, 1990, both Quinn-L and Professional Investors, a partnership that was one of the 157 Investors, moved to dismiss the action on the ground that three of the partners in Professional Investors were citizens of the same states as Royal. (R. 277-353 [Vol. 2]). In response, on September 28, 1990, Royal voluntarily dismissed its claims against Professional Investors, without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1). (R. 444-45 [Vol. 2]).

On October 1, 1990, Quinn-L and Professional Investors renewed their motion to dismiss this action for lack of diversity jurisdiction. (R. 446-63 [Vol. 2]). They based

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[4] Royal also argued that joinder of the Investors was permitted under Fed. R. Civ. P. 20(a). (R. 144-45 [Vol. 1]).

their motion on the contention that Professional Investors was an "indispensable" party to the action, within the meaning of Fed. R. Civ. P. 19(b), and that therefore Royal could not preserve diversity jurisdiction by dismissing Professional Investors. (*Id.*) On October 3, 1990, Royal filed a brief in opposition, arguing that Professional Investors was *not* an "indispensable" party because its interests would be fully represented by Quinn-L and the 156 diverse Investors, who were all parties to the action.[5] (R. 464-91 [Vols. 2-3]). On October 5, 1990, the district court denied the motion to dismiss. (R. 526 [Vol. 3]).

Undeterred, Quinn-L and the Investors continued to file virtually identical motions to dismiss, arguing that Professional Investors was an "indispensable" party whose presence would deprive the court of diversity jurisdiction.[6]

On December 20, 1991, the district court granted summary judgment to Royal on all of the parties' claims

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[5] Royal also argued that the district court had jurisdiction because there was complete diversity on March 9, 1990, when the current action was filed. (R. 486-88 [Vol. 3]).

[6] These motions were filed on October 18, 1990; October 22, 1990; October 29, 1990 (2 separate motions); November 5, 1990; November 13, 1990; November 27, 1990; December 3, 1990; December 11, 1990; December 27, 1990; and August 29, 1991. (R. 595-622 [Vol. 3]; 643-70 [Vol. 3]; 821-48 [Vol. 4]; 968-95 [Vol. 5]; 1054-81 [Vol. 5]; 1408-35 [Vol. 6]; 1496-1523 [Vol. 7]; 1537-64 [Vol. 7]; 1571-98 [Vol. 7]; 1899-1925 [Vol. 9]). Royal filed oppositions to these motions on November 6, 1990; November 28, 1990; December 12, 1990; December 13, 1990; January 3, 1991; and September 12, 1991. (R. 1019-27 [Vol. 5]; 1436-38 [Vol. 6]; 1565-70 [Vol. 7]; 1599-1601 [Vol. 7]; 2099-2101 [Vol. 9]). The defendants filed one reply brief on November 14, 1990. (R. 1084-94 [Vol. 5]).

and defenses. (R. 2647-78 [Vol. 12]). In so doing, the court denied the defendants' various motions to dismiss, holding that Professional Investors was *not* an "indispensable" party to the action, and thus that its non-diverse citizenship did not destroy diversity jurisdiction. (R. 2657-58 [Vol. 12]). Neither Quinn-L nor the Investors ever appealed from the district court's ruling that Professional Investors was not indispensable.

11. This Court's Decision In Royal I

Earlier, on November 30, 1990, the district court had preliminarily enjoined Quinn-L and the Investors from prosecuting the two Cameron County actions. *Royal Ins. Co. v. Quinn-L Capital Corp.*, 759 F. Supp. 1216 (N.D. Tex. 1990). On May 5, 1992, this Court affirmed the injunction in part and reversed in part. *Royal I*, 960 F.2d 1286. This Court first rejected the Investors' and Quinn-L's challenge to the district court's subject matter jurisdiction; because the district court had ancillary jurisdiction to enforce its prior judgment, the Court declined to address whether the district court also had diversity jurisdiction. The Court then held that the district court was entitled to enjoin the parties from relitigating the issues decided in the first federal declaratory judgment action – namely, whether Royal's policies provided coverage for the Investors' claims against Quinn-L. But the Court held that the district court could not enjoin the litigation in Cameron County of the so-called "post-declaratory judgment torts" relating to the *Adkisson* action. Instead, the district court

and the Cameron County court could concurrently adjudicate those claims until one or the other entered final judgment. *Id.* at 1299, 1300.

At the same time, however, the Court denied Quinn-L's and the Investors' request to vacate the district court's summary judgment of December 20, 1991, which had rejected their post-declaratory judgment tort claims as well as their motions to dismiss for failure to join the non-diverse Professional Investors. *Id.* at 1300-01. The Court noted that its decision not to vacate the summary judgment was equitable, since "[appellants] created this tangled web of litigation by seeking to evade the effect of the first declaratory judgment action." *Id.* at 1301. The Court added that, if Quinn-L and the Investors were dissatisfied with the summary judgment, they could take a second appeal.

12. The District Court Enters Final Judgment In Royal's Favor On All Claims In This Action

On July 1, 1992, the district court entered final judgment in this action in favor of Royal. The court granted Royal's application for entry of final declaratory relief, both on the coverage claims (*i.e.*, whether Royal's policies provided coverage for the Investors' claims against Quinn-L) and on the "post-declaratory judgment tort" claims (*i.e.*, whether Royal was liable to Quinn-L or the Investors based its conduct with respect to the *Adkisson* action). The court also entered a permanent injunction that barred Quinn-L and the Investors from relitigating any of the claims or issues decided in this action or in the

first federal declaratory judgment action. (R. 2917-34 [Vol. 13]). Quinn-L and the Investors appealed.

13. This Court Affirms The Judgment And Permanent Injunction In Royal II

On September 27, 1993, this Court affirmed the district court's judgment in all respects. *Royal II*, 3 F.3d 877.

Among other things, this Court expressly rejected the argument made by Quinn-L and the Investors that the district court lacked diversity jurisdiction over this action. *Id.* at 882-83. Quinn-L and the Investors did not argue to this Court, as they had below, that diversity jurisdiction was lacking because Professional Investors was an "indispensable" party whose citizenship had to be considered. Instead, they argued that Royal, like certain defendants, was a citizen of Texas, because a state statute requires out-of-state insurers, like Royal, to have a Texas agent-in-fact. (R. 3541-42 [Vol. 16]). This Court held, however, that Royal was not a citizen of Texas, and thus that there was complete diversity. *See* 3 F.3d at 882-83.

Quinn-L and the Investors sought review of this Court's decision in *Royal II* by the United States Supreme Court, which denied certiorari on April 18, 1994. *Quinn-L Capital Corp.*, 114 S. Ct. 1541.

14. The Investors Unsuccessfully Move For Relief From Judgment

On July 13, 1995, fifteen months after the Supreme Court denied certiorari and three years after the district court entered final judgment for Royal, Professional

Investors, on behalf of itself and all of the other Investors, filed a motion for relief from judgment. (R. 3556 n.1 [Vol. 16]).[7] This motion, which was brought pursuant to Fed. R. Civ. P. 60(b)(5), argued that the district court did not have diversity jurisdiction over this action and thus did not have jurisdiction to decide any of the issues pertaining to Royal's alleged post-declaratory judgment torts. (R. 3567 [Vol. 16]).[8]

In support of that position, the Investors asserted, *for the first time*, that all of them had been part of a "partnership" or "unincorporated association" that was formed for the purpose of prosecuting the claims assigned by Quinn-L; that this entity was the "real" and "indispensable" defendant in this action; that the citizenship of this entity must therefore be considered in determining whether diversity existed; and that the entity was not diverse from Royal, because the citizenship of a partnership or unincorporated association is determined by the citizenship of its partners or members, and the entity's members included the non-diverse Professional Investors. (*See, e.g.*, R. 3661-65 [Vol. 16]). The Investors argued that they had brought their motion "within a reasonable time," as required by Rule 60(b), because they were predicating the motion on a "recent modification in decisional law" – namely, *Bankston v. Burch*, 27 F.3d 164 (5th Cir.

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[7] Quinn-L is also named as an appellant in the Notice of Appeal. (R. 3808 [Vol. 16]). However, for the sake of simplicity, Royal refers to all appellants as "the Investors."

[8] Professional Investors conceded that the district court had ancillary jurisdiction over the coverage issues, which originally were decided in the first declaratory judgment action (R. 3567 [Vol. 16]; *see also* R. 3770 [Vol. 16]).

1994), which was decided nearly a year earlier, on July 29, 1994. (R. 3557; 3562 [Vol. 16]). On December 5, 1995, Albertson, one of the Investors, filed a duplicative Rule 60(b)(5) motion. (R. 3769-75 [Vol. 16]).[9]

On January 12, 1996, the district court denied both Rule 60(b)(5) motions (which will be collectively referred to as "the Investors' motion"). (R. 3791-97 [Vol. 16]). The court found that the Investors had not, in fact, formed any "partnership" or "unincorporated association." (R. 3795 [Vol. 16]). The court also held that, whether or not any such "partnership" or "unincorporated association" had been formed, the Investors' argument was untimely, because they "should have, and could have, raised the 'Partnership/UA' issue long ago." (R. 3796 [Vol. 16]). Finally, the court held that the Investors' motion had not been brought "within a reasonable time," because *Bankston v. Burch* – the supposed "recent modification in decisional law" – was not applicable and, in any event, did "not depart[] from established precedent." (R. 3795 n.1; 3797 [Vol. 16]).

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[9] Neither Professional Investors nor Albertson argued – as had the Investors and Quinn-L in 1990 and 1991 – that Professional Investors was itself an indispensable party. On the contrary, they argued that none of the Investors, including Professional Investors, individually owned any of the claims assigned by Quinn-L; that only the "partnership" or "unincorporated association" owned those claims; and that this entity was the "indispensable" or "real" party to the controversy. (*See, e.g.*, R. 3663-65 [Vol. 16]; *see also* App'ts Br. at 21 ("the unincorporated association/partnership was the only real party to the controversy as to the post declaratory judgment torts")).

SUMMARY OF ARGUMENT

A final judgment is supposed to be just that – final, definitive, and unassailable. Accordingly, Congress and the federal courts, in Rule 60(b) of the Federal Rules of Civil Procedure and in the case law applying that rule, have carefully limited the circumstances in which a final judgment may be reopened. As the Investors' own former appellate counsel has observed, the courts "have administered Rule 60(b) with a scrupulous regard for the aims of finality." 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2857 (2d ed. 1995), at 260. None of the circumstances permitting relief under Rule 60(b) is present here.

The Investors moved for relief from judgment on the ground that the claims in this case belong not to them individually, as had been assumed since September 1990, but instead to a heretofore undisclosed "partnership" or "unincorporated association" of all of the Investors. And because that supposed "partnership" or "unincorporated association" has members who are not diverse from Royal, the Investors contend that the district court did not possess diversity jurisdiction. This attempt to reopen the four-year-old judgment in this case fails for several independent reasons.

First, in order to reopen a judgment under the third clause of Federal Rule 60(b)(5) – the only provision relied on by the Investors – some changed circumstance must make it "no longer equitable that the judgment should have prospective application." The Investors have not identified any such change in the facts or the law. The only "new" fact on which they rely is the existence of the

alleged "partnership" or "unincorporated association." But this entity was supposedly created in September 1990, well before the entry of final judgment in this case in July 1992. The only "new" law on which the Investors rely, *Bankston v. Burch*, 27 F.3d 164 (5th Cir. 1994), is not new at all. *Bankston* expressly follows Fifth Circuit authority that predates July 1992.

Second, even aside from whether the Investors have adequately established any change in the facts or the law since the entry of final judgment, the district court was well within its discretion in rejecting the Investors' jurisdictional challenge on the merits. The court was entitled to conclude that, contrary to the Investors' belated assertions, no "partnership" or "unincorporated association" was ever created to litigate the Investors' claims. Moreover, even the Investors concede that this alleged entity did not exist when this action was filed, which is the relevant time for determining diversity jurisdiction under controlling Supreme Court authority.

Finally, as the district court concluded, the Investors did not seek relief from judgment "within a reasonable time," as Rule 60(b) requires. They waited until 1995 to raise arguments that they easily could have raised as early as 1990, when they first sought the dismissal of this action for want of diversity jurisdiction. Moreover, whether or not *Bankston* could be deemed to have changed Fifth Circuit law, the Investors did not file their motion until almost one year after *Bankston* was decided, and therefore not "within a reasonable time."

ARGUMENT

This Court reviews the denial of a Rule 60(b) motion for relief from judgment under a highly deferential abuse of discretion standard. *See, e.g., First Nationwide Bank v. Summer House Venture,* 902 F.2d 1197, 1200-01 (5th Cir. 1990). In other words, "[i]t is not enough that the granting of relief [under Rule 60(b)] might have been permissible, or even warranted, denial must have been so *unwarranted* as to constitute an abuse of discretion." *Id.* at 1201 (internal quotations and citations omitted). Clearly, the district court did not abuse its discretion in denying the Rule 60(b)(5) motion in this case.

I. THE INVESTORS ARE NOT ENTITLED TO RELIEF FROM JUDGMENT UNDER RULE 60(B)(5) ON THEIR CLAIM THAT THE DISTRICT COURT IMPROPERLY EXERCISED DIVERSITY JURISDICTION

A. The Investors Have Entirely Failed To Identify Any "Changed Circumstances" – An Essential Prerequisite To Relief Judgment Under Rule 60(b)(5)

In seeking relief from judgment, the Investors rely solely on the final clause of Rule 60(b)(5). That provision allows a district court to grant relief when "it is no longer equitable that the judgment should have prospective application." *See* App'ts Br. at 36.

This clause affords relief, however, only when there has been a significant change in circumstances *after* the entry of judgment. It does not apply to a claim that the district court erred on the basis of the law or the facts in

existence at the time of judgment. *See United States v. Georgia Power Co.*, 634 F.2d 929, 932-33 (5th Cir. 1981) (this clause recognizes "[t]he power of a court of equity to modify the prospective effect of its decrees in response to changed circumstances"), *vacated on other grounds*, 456 U.S. 952 (1982); *accord* 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2863 (2d ed. 1995), at 336; *see also Swift Chemical Co. v. Usamex Fertilizers, Inc.*, 490 F. Supp. 1343, 1350 (E.D. La. 1980) (this clause does not afford relief where "no material operative facts" have changed since the entry of judgment), *aff'd*, 646 F.2d 1121 (5th Cir. 1981).

Accordingly, to the extent that the Investors argue that the district court erred in exercising jurisdiction under the facts and law in existence as of the entry of final judgment in July 1992, Rule 60(b)(5) cannot afford them any relief. Indeed, the Investors' arguments are based entirely on facts that existed, if at all, prior to July 1992 and on law that has not changed since July 1992.

The Investors' Rule 60(b)(5) motion centers on the existence of a "partnership" or "unincorporated association" consisting of all the Investors – an entity that the Investors contend was an "indispensable" party to this action whose joinder would have defeated diversity jurisdiction. But this alleged entity, according to the Investors' own assertions, was formed in September 1990. The "partnership" or "unincorporated association" cannot, therefore, constitute a "material operative fact" that occurred or become known to the Investors after July 1992. *Swift Chemical*, 490 F. Supp. at 1350. Its existence does not provide the Investors with any ground for seeking relief under Rule 60(b)(5).

The only "changed circumstance" even suggested by the Investors is this Court's decision in *Bankston v. Burch*, 27 F.3d 164, which was decided after the entry of final judgment in this case. They contend, as an alternative argument, that *Bankston* changed the law in the Fifth Circuit such that, even if the district court had diversity jurisdiction under the law that existed in 1992, it did not have jurisdiction under the law announced by *Bankston* in 1994. However, given that *Bankston* did not, in fact, alter Fifth Circuit law and that *Bankston* has no application to this case, *Bankston* cannot provide any basis for relief under Rule 60(b)(5).

In *Bankston*, a limited partner brought a derivative suit, on behalf of the partnership, against the general partner. This Court held that the partnership was an "indispensable" party to the derivative action and that its citizenship should thus have been considered in determining diversity jurisdiction. 27 F.3d at 168-69. The *Bankston* Court specifically acknowledged that it was *not* departing from circuit precedent. Instead, the Court stated that it was merely "follow[ing]" its earlier decision in *Whalen v. Carter*, 954 F.2d 1087 (5th Cir. 1992), which held that a partnership is an indispensable party in a lawsuit brought by limited partners against the managing partners. *See Bankston*, 27 F.3d at 168 ("We consider the reasoning of *Whalen* sound and we follow it today in holding that [the partnership] was an indispensable party in [the limited partner's] derivative lawsuit") (footnote omitted). *Whalen* was decided four months before the district court entered final judgment in this case. Accordingly, the Investors cannot properly invoke *Bankston* as

the "changed circumstance" that is an essential prerequisite to relief under Rule 60(b)(5). The court below correctly recognized as much. (R. 3795 n.1 [Vol. 16]).

There is another reason why *Bankston* cannot provide the basis for Rule 60(b)(5) relief. The Investors contend that *Bankston* is applicable here because, and only because, the claims at issue belong to the "partnership" or "unincorporated association," not to the Investors individually. It is on this ground that the Investors seek to analogize these claims to the derivative claims in *Bankston*. As discussed immediately below, however, the Investors' position rests on a false premise. There is no "partnership" or "unincorporated association" to which these claims belong. Or, at a minimum, there was no such entity at the time relevant to determining diversity jurisdiction. Consequently, as the district court recognized, "[t]he *Bankston* case does not apply to the instant lawsuit." (R. 3795 [Vol. 16]).

B. The District Court Was Entitled To Conclude That Diversity Jurisdiction Existed In This Action

Even aside from whether the Investors presented any of the new facts or the new law that are necessary to support a Rule 60(b)(5) motion, the district court was justified in rejecting the Investors' jurisdictional challenge on the merits. In the first place, the court found that no "partnership" or "unincorporated association" was ever formed to litigate the Investors' claims against Royal. This finding of fact is not clearly erroneous. Moreover, whether or not any such entity was formed in

September 1990, it concededly had not been formed six months earlier, when this action was filed. And that is the date that the Supreme Court has held to be relevant for assessing diversity jurisdiction.

1. There Never Was Any "Partnership" Or "Unincorporated Association" To Prosecute The Investors' Claims

The district court found that, contrary to the Investors' assertions, no "partnership" or "unincorporated association" was ever formed to prosecute the claims assigned by Quinn-L. *See* R. 3795 [Vol. 16] ("There is no partnership here; no language in Quinn-L's assignment of rights to the investors suggests that the 'Partnership/UA' was formed or was a party to the action"). A district court's findings of fact on a Rule 60(b) motion are to be upheld on appeal unless clearly erroneous. *Ginther v. O'Connell*, 791 F.2d 1151, 1153 (5th Cir. 1986). The court below committed no such error here.

As the district court observed, Quinn-L's written assignment of claims to the Investors contains no suggestion whatsoever that the Investors had formed a "partnership" or "unincorporated association" for the purpose of receiving or prosecuting the assigned claims. (*See* R. 3672-84 [Vol. 16]). Nor have the Investors pointed to any other document that purports to create such a "partnership" or "unincorporated association."

Of course, if any such "partnership" or "unincorporated association" had really been formed in September 1990, the Investors would doubtless have mentioned it well before July 1995. But they did not. The district court

could have inferred from the Investors' prolonged silence that the "partnership" was nothing more than a clever argument concocted by their counsel after the fact in an attempt to reopen the judgment. *See Western Water Management, Inc. v. Brown*, 40 F.3d 105, 108-09 (5th Cir. 1994) (where a party makes an assertion that it could have made earlier, but did not, the court may consider the "belated" nature of the assertion in assessing its credibility).

The Investors purport to find support for their position in the affidavit of G. Lee Cranfill, which was attached as an exhibit to the motion to dismiss that the Investors filed on September 27, 1990. *See* App'ts Br. at 22. Specifically, the Investors rely upon Cranfill's statement that Professional Investors, "by written contract, is an assignee, jointly, with all of the other [Investors], of all of the rights of the Quinn-L Defendants against [Royal]." (R. 3585 [Vol. 16]). The meaning of this statement is far from clear. It does not establish that any "partnership" was created. The joint ownership of property (such as choses in action) "does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." Tex. Rev. Civ. Stat. art. 6132b, § 7(2) (1970). Nor is Cranfill's statement sufficient, in itself, to establish that there was any "unincorporated association," which is defined under Texas law as an entity "formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective." *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) (footnote and citation omitted). Moreover, even if Cranfill's cryptic statement could be construed as asserting the existence of a "partnership" or

"unincorporated association" (which it cannot), the written assignment has no language corroborating Cranfill's characterization of it. The district court was entitled, therefore, to question the credibility of Cranfill's statement.

Finally, the Investors point to the "uncontroverted" affidavits of their own counsel, executed almost five years after the assignment of Quinn-L's claims, as demonstrating that those claims were assigned to a "partnership" or "unincorporated association" of all the Investors. *See* App'ts Br. at 20 (citing R. 3620-29 [Vol. 16]). Contrary to the Investors' assertions, however, these self-serving affidavits *are* controverted – by the absence of any language in the written assignment supporting counsel's position. Moreover, even if the affidavits were not controverted, the court would not have been obligated to accept them as true. *See, e.g., Davis v. C.I.R.*, 866 F.2d 852, 858 (6th Cir. 1989) (a trial court may assess the credibility of uncontroverted testimony); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514 n.8 (9th Cir. 1985) (same). In this case, given that these affidavits were submitted almost five years after the fact, the district court had ample reason to question their credibility. *See Western Water Management*, 40 F.3d at 108-09.

In sum, the district court's conclusion that Quinn-L did *not* assign its claims against Royal to any "partnership" or "unincorporated association" is, at a minimum, not clearly erroneous. It was thus unnecessary for the court to consider whether any such alleged entity was an "indispensable" party whose joinder would defeat diversity jurisdiction.

2. Because The Partnership Did Not Exist When This Action Was Filed, Its Citizenship Could Have No Bearing On Diversity Jurisdiction

In any event, whether or not any "partnership" or "unincorporated association" was ever formed to litigate the claims against Royal, the Investors concede that this alleged entity had not been formed when this action was filed in March 1990. The Supreme Court has made clear that diversity jurisdiction must be determined as of the time that an action is commenced. Since the "partnership" or "unincorporated association" did not even exist in March 1990, much less possess any claims against Royal, the district court could not properly have considered its citizenship in determining diversity jurisdiction.

In *Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991), the Supreme Court held that "diversity of citizenship is assessed at the time the action is filed"; hence, "if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Id.* at 428. In that case, McMoRan and Freeport-McMoRan, which were completely diverse from K N Energy, sued K N Energy in federal court for breach of contract. After the suit began, McMoRan assigned its interest in the contract to another company, FMPO, which was not diverse from K N Energy. The Supreme Court held that, given the FMPO was not an "indispensable" party at the time that the action was filed, its subsequent addition to the action did not destroy diversity, because "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action." *Id.*

The same rule must apply here. The alleged "partnership" or "unincorporated association" could not have been an "indispensable" party when this action was filed on March 9, 1990. Not only was this alleged entity, like FMPO in *Freeport-McMoRan*, not at that time an assignee of Quinn-L's claims. But the alleged entity, by the Investors' own account, did not even exist. The Investors themselves state that the "partnership" or "unincorporated association" was not created until September 4, 1990, the date on which Quinn-L assigned its claims against Royal to the Investors. *See* App'ts Br. at 24 ("the 4 September 1990 assignment created the association"); *accord id.* at 22 n.19.

The Investors cite *Carlton v. BAWW, Inc.*, 751 F.2d 781, 785 (5th Cir. 1985), for the proposition that diversity jurisdiction must be reassessed when "an amendment to the pleadings" adds an indispensable party or alters the nature of the action. App'ts Br. at 39 n.32. However, *Freeport-McMoRan*, a controlling decision that the Investors fail even to mention, clearly overruled *Carlton's* holding that diversity is destroyed by the addition of a non-diverse party who becomes "indispensable" only after suit was filed. 498 U.S. at 428; *see Whalen*, 954 F.2d at 1096 ("*Freeport McMoRan* concluded that the addition of a nondiverse party does not defeat diversity jurisdiction unless the party was indispensable at the time the plaintiff filed its complaint").[10]

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[10] This Court in *Bankston* recognized the difference between that case, where the non-diverse party was indispensable from the outset, and *Freeport-McMoRan*, where the non-diverse party became indispensable at some later time. *See Bankston*, 27 F.3d at

Moreover, whether or not diversity jurisdiction may ever, consistent with *Freeport-McMoRan*, be reassessed when "an amendment to the pleadings alters the nature of the action," Royal never amended its pleadings in such a way as to alter the nature of the action. Royal's supplemental petition, filed on September 27, 1990, added the Investors as defendants, but did not alter the nature of Royal's claims (*i.e.*, that its policies provided no coverage to Quinn-L in the *Adkisson* action). (R.A-9 Ex. 100].[11] It is true that Quinn-L's answer, filed on August 15, 1990, raised the additional issue of whether Royal had committed any "post-declaratory judgment torts" that rendered it liable for the *Adkisson* judgment even if coverage did not exist under the policies. (R. 121-28 [Vol. 1]). But an answer is not an "amendment to the pleadings" and does not alter the nature of a plaintiff's claims.[12]

In sum, given that the alleged "partnership" or "unincorporated association" did not exist when this action was commenced, its citizenship could not, under

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168 n.13. For the reasons explained in the text, this case is analogous to *Freeport-McMoRan*, not *Bankston*.

[11] The Investors claim that the filing of the Cranfill affidavit, as an attachment to one of their own pleadings, required the district court to reassess diversity jurisdiction. App'ts Br. at 39 n.32. However, beyond the fact that the Cranfill affidavit, as discussed above, adds nothing to the Investors' case, it certainly does not qualify as an "amendment to the pleadings." *Carlton*, 751 F.2d at 785.

[12] Moreover, even if diversity jurisdiction had been reassessed at the time that Quinn-L filed its answer on August 15, 1990, the alleged "partnership" or "unincorporated association" still could not have been an "indispensable" party, since it concededly did not exist at the time.

Freeport-McMoRan, defeat diversity jurisdiction. Accordingly, even if such an entity were ultimately formed (which it was not) and even if the Investors had alleged "changed circumstances" sufficient to invoke Rule 60(b)(5) (which they did not), the district court would still have been justified in declining to grant relief from judgment.

II. COURTS HAVE CONSISTENTLY RECOGNIZED UNDER OTHER PROVISIONS OF RULE 60(B) THAT A JUDGMENT CANNOT BE REOPENED TO REASSESS SUBJECT-MATTER JURISDICTION

The Investors have not sought relief from judgment under Rule 60(b)(4), which permits such relief when "the judgment is void," or under any other provision of Rule 60(b). Indeed, they have specifically disclaimed any reliance upon Rule 60(b)(4). (R. 3667 n.7 [Vol. 16]). And for good reason. The federal courts routinely refuse to reopen judgments under Rule 60(b)(4) that are claimed to be "void" due to an absence of subject-matter jurisdiction. The Investors should not be permitted to accomplish under Rule 60(b)(5) what they could not accomplish under Rule 60(b)(4) – the reopening of a final judgment based on an allegedly mistaken exercise of subject-matter jurisdiction.

This Court and other federal appellate courts have recognized that, even if a district court erred in concluding that it had subject-matter jurisdiction, that error will not make the judgment "void" within the meaning of Rule 60(b)(4). *See, e.g., Picco v. Global Marine Drilling Co.,*

900 F.2d 846, 850 (5th Cir. 1990) (a court's determination as to its own jurisdiction is not subject to attack under Rule 60(b)(4), provided the moving party previously had a "full and fair" opportunity to litigate that issue); *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972) ("[a] court has the power to determine its own jurisdiction, and an error in that determination will not render the judgment void" within the meaning of Rule 60(b)(4)).[13]

It is thus "well established that a federal court's erroneous assumption of diversity jurisdiction does not render the judgment null but only erroneous." *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982) (citation omitted); *see also, e.g., Yanow v. Weyerhaeuser Steamship Co.*, 274 F.2d 274, 279 (9th Cir. 1959) (even if a district court is "demonstrably wrong" in determining that it has diversity jurisdiction, that error does not make its judgment "void"), *cert. denied*, 362 U.S. 919 (1960). Accordingly, even if the district court erred in exercising diversity jurisdiction in this case (which, as explained above, it did not), that would have been no reason to reopen the judgment under

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[13] This Court did hold in *Picco*, that where there has been a "clear usurpation of power" by the district court, Rule 60(b)(4) relief may be appropriate. 900 F.2d at 850 n.6 (citing *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986)). However, as the Second Circuit held in *Nemaizer*, where a court merely errs in concluding that it has jurisdiction, such an error does not constitute a "clear usurpation of power." 793 F.2d at 65. Here, given that this Court twice upheld the district court's exercise of subject-matter jurisdiction, no "clear usurpation of power" could conceivably have occurred. *See Royal I*, 960 F.2d at 1292 (ancillary jurisdiction); *Royal II*, 3 F.3d at 882-83 (diversity jurisdiction).

Rule 60(b)(4). It should likewise be no reason to reopen the judgment under Rule 60(b)(5).

III. THE INVESTORS FAILED TO BRING THEIR MOTION "WITHIN A REASONABLE TIME" AS RULE 60(B) REQUIRES

The district court offered a final reason why the Investors were not entitled to relief from judgment: they did not seek such relief "within a reasonable time" as required under Rule 60(b), since they waited until 1995 to raise arguments that they could have raised as early as 1990. (R. 3795-96 [Vol. 16]). A district court's determination that a Rule 60(b) motion was not brought in a timely manner is reviewed "under the highly deferential abuse of discretion standard." *First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992) (citation omitted). Clearly, the district court did not abuse its discretion here.

The Investors did not file their Rule 60(b)(5) motion until July 13, 1995, more than *three years* after the entry of judgment on July 1, 1992. (R. 3551-634 [Vol. 16]; R. 2917-34 [Vol. 13]). *See Transit Casualty Co. v. Security Trust Co.*, 441 F.2d 788, 791 (5th Cir. 1971) (the date from which to measure the timeliness of a Rule 60(b) motion is the date of the district court's judgment, not the date on which that judgment is affirmed), *cert. denied*, 404 U.S. 883 (1971). There was no justification for such delay.[14]

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[14] The Investors argue that Professional Investors, Albertson, and the "unincorporated association/partnership" were not parties to this action and therefore did not have an

The Investors based their motion on an argument that they could easily have made, but did not, prior to the entry of judgment: that Quinn-L's claims against Royal had been assigned to a "partnership" or "unincorporated association" of all the Investors, and that this entity was an "indispensable" party whose citizenship should have been considered in determining diversity jurisdiction. As noted above, the Investors themselves contend that this "partnership" or "unincorporated association" was created on September 4, 1990, when the Investors received the assignment of claims from Quinn-L. App'ts Br. at 22 n.19, 24.

Yet, when the Investors and Royal were litigating the issues of whether there was diversity jurisdiction and whether Royal had failed to join any "indispensable" parties – issues on which the parties filed numerous briefs between September 27, 1990 and September 12,

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opportunity to make arguments of their own prior to the entry of final judgment. App'ts Br. at 38 n.31. However, even if one were to accept this argument at face value, it would not explain why these movants did not file their Rule 60(b) motions for more than three years after the judgment was entered. Moreover, the Investors cite no authority for the novel proposition that Rule 60(b) motions by non-parties should be treated more indulgently than Rule 60(b) motions by parties. Indeed, that proposition makes no sense since non-parties do not even have standing to file Rule 60(b) motions unless they are in privity with a party. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2865 (1995), at 379 (Rule 60(b) "allows relief from a judgment to be given to 'a party or his legal representative.' This allows one who is in privity with a party to move under the rule. With this exception, one who was not a party lacks standing to make the motion. . . . ") (footnotes omitted).

1991 – the Investors never once relied upon (or even asserted) the existence of this "partnership" or "unincorporated association." As the district court held in denying the Investors' Rule 60(b) motion, "[c]learly, [the Investors] should have, and could have, raised the 'Partnership/UA' issue long ago." (R. 3796 [Vol. 16]).[15]

Nor does this Court's decision in *Bankston* justify the Investors' delay in filing their motion. As explained above, *Bankston* does not alter existing Fifth Circuit law or have any application to this case; hence, the date of the *Bankston* decision is irrelevant to the timeliness of the Rule 60(b)(5) motion. In any event, however, the Investors waited too long to file a motion based on *Bankston*. That case was decided on July 29, 1994, but the Investors did not file their motion until July 13, 1995. (R. 3551-634 [Vol. 16]). The opinion in *Bankston* was short, clear, and straightforward; it should not have taken the Investors almost a year to digest its implications.

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[15] The Investors contend that they "had no duty to apprise Royal of the real party to the controversy, the unincorporated association/partnership" and that "Royal, alone, had the burden to sue the correct party." App'ts Br. at 23. However, Royal's only obligation was to establish that there was diversity jurisdiction with respect to the parties that it had sued. It did so. This is unlike the situation in *Stafford v. Mobil Oil Corp.*, 945 F.2d 803 (5th Cir. 1991) and *Elliott v. Tilton*, 62 F.3d 725 (5th Cir. 1995), *withdrawn and superseded on rehearing*, 69 F.3d 35 (5th Cir. 1995) – the cases advanced by the Investors – where plaintiffs failed to adequately allege diversity with respect to the parties that they had sued. If the Investors believed that Royal had failed to join an indispensable party (the alleged "partnership/unincorporated association") and that the citizenship of that party would destroy diversity jurisdiction, it was the Investors' responsibility to make that argument.

Under these circumstances, the district court did not abuse its discretion by holding that the Investors failed to bring their Rule 60(b) motion "within a reasonable time." The untimeliness of the Investors' motion is sufficient, in itself, to justify the denial of that motion.

It is well past time for this "tangled web of litigation" to come to an end. The Investors had a full and fair opportunity to litigate their claims against Royal in the district court, both with respect to subject-matter jurisdiction and with respect to the merits of the parties' claims and defenses. They lost. They had a full and fair opportunity to challenge the district court's decision in this Court. They lost. They then petitioned for rehearing en banc in this Court and for a writ of certiorari in the Supreme Court. And, again, they were denied relief. The law does not allow the Investors and their counsel to pursue this litigation any longer.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Patricia J. Villareal (BMcD)
Chester J. Hinshaw
Patricia J. Villareal
JONES, DAY, REAVIS & POGUE
2300 Trammel Crow Center
2100 Ross Avenue
Dallas, Texas 75201

Attorneys for Appellees

Barbara McDowell
Stephen J. Goodman
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that I have caused true and correct copies of appellees' brief to be served by U.S. express mail on Samuel L. Boyd, Boyd & Associates, One Galleria Tower, 13355 Noel Road, LB 87, Dallas, Texas 75240-6608, on this the 25th day of June, 1996.

/s/ Barbara McDowell
Counsel for Appellees

APPENDIX F – REPLY BRIEF OF APPELLANTS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 12, 1996

NO. 96-10078

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROYAL INSURANCE COMPANY OF AMERICA, ET AL.
Plaintiffs/Appellees

V.

QUINN-L CAPITAL CORPORATION, ET AL.
Defendants/Appellants

On Appeal From the
United States District Court for the
Northern District of Texas
Dallas Division
Honorable Barefoot Sanders, District Judge

REPLY BRIEF OF APPELLANTS

BOYD & ASSOCIATES

SAMUEL L. BOYD, P.C.
PRISCILLA E. PERRY

One Galleria Tower, 21st Floor
13355 Noel Road, LB 87
Dallas, Texas 75240-6608
(214) 726-0204
(214) 726-0208 (fax)

COUNSEL FOR APPELLANTS

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ARGUMENT

Appellants will respond, *seriatim,* to the points raised by Appellees in their response, as follows:

I. Royal Created this Litigation's "Tangled Web"

In hindsight, it has become apparent that Appellees (collectively, Royal) created much of this litigation's "tangled web," because: (a) Royal manipulated the parties so as to avoid suing the real party to the controversy; thus affecting the district court's diversity subject matter jurisdiction; and (b) Royal's manipulation went undetected not only by Appellants but, as well, the district court, the Fifth Circuit Court of Appeals and the United States Supreme Court;[1] and (c) by manipulating the parties and failing to sue the real party to the controversy, Royal

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[1] *But see Carden v. Arkoma Assoc.,* 494 U.S. 185, 195-96 (1990) (federal courts, always called upon to decide diversity citizenship).

nonetheless secured all encompassing relief against the nondiverse and sole owner of the rights which Royal sought to attack by *Royal II*.[2] Simply, and although Royal's manipulation of the parties masked the same from Appellants and all the relevant judicial panels, the lower court never possessed subject matter jurisdiction over the real party to the controversy, the nondiverse unincorporated association/partnership comprised of each and every Investor, under either 28 U.S.C. § 1332 (diversity) or 28 U.S.C. 2283 (ancillary); more especially, as to the unincorporated association's Texas state court actions for Royal's post-*Royal I* declaratory judgment torts.[3]

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[2] In March 1990, the district court refused Royal's request to reopen its first declaratory judgment action (*Royal I*) to review coverage issues in a subsequent Dallas state action (*Atkinson*); referring Royal to the Texas state courts for relief. Disregarding the federal court's direction, Royal filed a completely new federal declaratory judgment action (*Royal II*). In *Royal II*, Royal addressed coverage issues regarding the Quinn-L Defendants (collectively, Quinn-L) in *Atkinson*. (R.001).

[3] Thus, contrary to Royal's continuing mischaracterization of Appellants' points on appeal, Appellants have not argued indispensability under Fed. R. Civ. P. 19 or either PIP Partners or the unincorporated association/partnership. Rather, Appellants have argued that Royal failed to sue the real party to the controversy, the unincorporated association/partnership composed of each of the 157 individual Investors. Thus, it is inequitable to continue permanently enjoining the nondiverse real party to the controversy (the unincorporated association/partnership) which was never a party to the suit in which the district court has issued the injunction, in the first instance. Specifically, the unincorporated association was the real party to the controversy as to Royal's post-declaratory judgment torts, because it (comprised of all 157 Investors) was the sole owner of

Thus, the district court's denial of appellants' Fed.R.Civ.P. 60b(5) motions was an abuse of discretion. This is true, because by manipulating the parties, Royal indirectly secured an injunction against the sole owner of the rights which Royal targeted, although Royal never sued that party.

II. No Court Has Addressed the Issue Now on Appeal

In their response, Royal compared "apples" (Royal's manipulation of the parties by never suing the real party to the controversy, the unincorporated association/partnership) with "oranges" (whether subject matter jurisdiction was lacking in *Royal II* as to the joined parties, only). That is, in *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 882-83 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1541 (1994), this Court held only that: (a) Royal Lloyds of Texas was a Texas citizen by virtue of the citizenship of its legislatively mandated attorney-fact; and (b) Royal Lloyds of Texas' state citizenship could not be collaterally attacked in a subsequent action. On the other hand, the district court never decided, considered, determined, and the same was never an issue on appeal: (a) the citizenship of the real party to the controversy (the unincorporated association/partnership); and (b) Royal's Illinois and New York citizenship which was nondiverse with that of the unincorporated association/partnership by virtue of

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the very rights which Royal and the district court sought to litigate in *Royal II*. (App'ts Rec. Excerpts "F," "J," "O," "Q" & "R"; R.3551-634,3656-725, 3738-67, 3769-85, 3738-805 [Vol. 16]).

Professional Investor Partnership II's (PIP Partners) Illinois and New York citizenship. (App'ts Rec. Excerpts "F" Ex. 3-A; R. 3584-86 [Vol. 16]).[4]

III. The Investors' Express Disclosure of the Unincorporated Association, in September 1990, to the District Court and Royal

The record is unequivocally clear: the Investors expressly disclosed the unincorporated association's existence to Royal and the district court in September 1990. Through filed pleadings and document productions in September 1990, Royal and the district court were on actual notice of the assignment's joint nature. (App'ts Rec. Excerpts "F" Ex. 3-A, "J" Ex. A; R. 3580, 3584-86, 3672-84 [Vol. 16]). Specifically, Lee Cranfill (Cranfill) stated in his filed affidavit that, " . . . [PIP Partners] by written contract, is an assignee, jointly,[5] with all of the other Plaintiffs in Cause No. 89-11030-M [*Atkinson*], of all the rights of the Quinn-L Defendants against [Royal]." (App'ts Rec. Excerpts "Q" Ex. A; R.3776-85 [Vol. 16])

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[4] Indeed, the district court determined only that neither Royal Plaintiff was a citizen of any state (Louisiana and Texas) whose citizenship was common solely to that of the **joined** Investors. (App't Rec. Excerpts "F" Ex. 1; R.3571 [Vol. 16]); *see also Kaspar Wire Works, Inc. v. Leco Eng'g & Machine, Inc.* 575 F.2d 530, 536-37 (5th Cir. 1978) (only issue preclusion in declaratory judgment actions).

[5] "Jointly" is defined as, " . . . shared by or common to two or more,"" . . . sharing with another or others," and " . . . formed or characterized by cooperation or united action." *The American Heritage Dictionary of the English Language* 706 (10th ed. 1981).

(emphasis added). Contrary to Royal's self-serving assertions, Royal did not have to assume anything; because, Royal was on specific notice of: (a) the unincorporated association's existence; and (b) the assignment's objective. Given such disclosure, Royal had no excuse for failing to sue the real party to the controversy. *See generally Martin v. Wilkes*, 490 U.S. 755, 768 (1989) (plaintiff seeking relief, burden to choose those included in its suit); *Littleton, Colo. v. Comm. Union Assur. Co.*,133 F.R.D. 159, 166 (D. Colo. 1990) (choosing both forum and defendants, plaintiff could not complain about obtainable relief's scope); *Matsushita Elec. Corp. of Am. v. McAllen Copy Data, Inc.*, 815 S.W.2d 850, 852 (Tex.App. – Corpus Christi 1991, writ denied) (under Texas law, no obligation to disclose that plaintiff should have brought suit against separate and distinct corporate entity). To have confirmed *Royal I's* declaratory judgment as to *Atkinson*, Royal should have sued the owner of Quinn-L's assigned rights, the unincorporated association comprised of each and every Investor. *See Navarro Sav. Ass'n. v. Lee* 446 U.S. 458, 461 (1980) (to properly secure its relief, plaintiff had to sue the real party to the controversy, the unincorporated association, whose citizenship was comprised by that of each of its members); *Carden*, 494 U.S. at 187 n.1 (question of which parties to consider for determining diversity jurisdiction, answered by application of "real party to the controversy test") (multiple respondents were not before court; instead, only one – the entity, "Arkoma Associates"); *Temple Drilling Co. v. La. Ins. Guar. Ass'n.*, 946 F.2d 390, 393 (95th Cir. 1991) (citizenship of unincorporated association for diversity purposes, is citizenship of each member). Importantly, no Investor, individually, received

or held any of the assigned rights; rather, each Investor possessed derivative, jointly-held rights, only. (App'ts Rec.Excerpts "J" Ex. A; R.3672-84 [Vol. 16]).

The only evidence before the district court (in September 1990 and July 1995) was that the unincorporated association/partnership unequivocally existed. Disclosure first occurred in September 1990 (via Cranfill's affidavit). Second, upon the July 1995 filing of PIP Partners' Fed. R. Civ. P. 60b(5) motion, it attached the affidavits of Samuel L. Boyd (Boyd) and Wayne R. Swift (Swift) which detailed the mechanics of the partnership's actual functioning. Third, the written assignment (also produced to Royal in 1990) embodied the unincorporated association's very existence as each and every Investor was a recognized: (a) joint assignee; and (b) judgment creditor. Fourth, by its express terms, the assignment's sole purpose was to enable the 157 Investors (the unincorporated association/partnership) to have jointly: (a) prosecuted the Quinn-L Defendants' tort claims against Royal and others; and (b) collected damages cause by Royal in the *Atkinson* case. (App'ts Rec. Excerpts "J" Exs. A & B-1, 2, "Q" Ex. A; R. 3686-95; 3776-78 [Vol. 16]); *see also Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) (unincorporated association, entity formed by mutual consent for purpose of promoting common enterprise or prosecuting common objective).

On the other hand, Royal has never presented any controverting evidence that the unincorporated association did not, in fact, exist. Yet, the district court has, from 1990 forward, failed to address Cranfill's September 1990 affidavit which, long ago, expressly disclosed the unincorporated association's existence. Finally, in its order

denying Appellants relief under Fed. R. Civ. P. 60b(5), the district court never addressed the Boyd, Swift and Cranfill affidavits, and never questioned the affiants' credibility. (App'ts Rec. Excerpts "B"; R.3791-97 [Vol. 16]).[6]

Throughout Royal has assiduously avoided the identity of the owner of the rights which they sought to litigate in *Royal II; i.e.,* the unincorporated association/partnership comprised of all 157 Investors. Notwithstanding Royal's manipulation, however, they still had the burden to sue the owner of the rights which they sought to effect.

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[6] Surely, it was clearly erroneous for the district court to have concluded that the unincorporated association/partnership did not exist when the only evidence before it (and never questioned by the Court) was that: (a) the Investors had disclosed the existence of the unincorporated association/partnership in September 1990 via Cranfill's affidavit; and (b) the 1995 Boyd and Swift affidavits merely described the formal mechanics of the partnership's operation. In this regard, Royal's citation to *Western Water Management, Inc. v. Brown,* 40 F.3d 105 (5th Cir. 1994), is inapplicable. That case dealt with a contempt proceeding wherein, after the evidentiary hearing, plaintiffs submitted affidavits from their competitors which attested that defendants' use of formulas was impermissible. *Id* at 108-09. The Fifth Circuit held that, because the affidavits were cumulative and uncontroverted, the court's consideration of them was not an abuse of discretion. *Id.* Indeed, if at all relevant, the case supports only Appellants; especially, considering the Fifth Circuit's citation to *Hoffman ex rel. NLRB v. Beer Drivers & Salesmen's Local Union No. 888,* 536 F.2d 1268, 1277 (9th Cir. 1976), for the proposition that uncontroverted affidavits (*e.g.,* like those of Cranfill, Boyd and Swift) may be treated as true.

IV. Under *Bankston*, Royal Could not Manufacture Diversity

Royal and the district court ignored that portion of the holding in *Bankston v. Burch*, 27 F.3d 164 (5th Cir. 1994), upon which Appellants based their Fed. R. Civ. P. 60b(5) motions. Appellants do not disagree that *Bankston* dealt with the Fed. R. Civ. P. 19 indispensability of a limited partner; however, *Bankston* also held that a plaintiff (such as Royal) could not manufacture diversity by manipulating the parties. *See Bankston*, 27 F.3d at 167-68.[7] Here, Illinois and New York citizenships were common to Royal and the unincorporated association. (App'ts Rec. Excerpts "F" Ex. 3; R. 3580-83 [Vol. 16]). Applying *Bankston's* general precepts has now made clear Royal's improper manipulation of the parties to manufacture complete diversity jurisdiction by: (a) never suing the unincorporated association/partnership; and (b) hurriedly dismissing the already joined, nondiverse unincorporated association member/partner, PIP Partners. *See*

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[7] Appellants concede that, initially, PIP Partners' Fed. R. Civ. P. 60b(5) motion argued that, as a limited partner, it was an indispensable party. However, in both PIP Partners' reply and supplement, as well as Paula M. Albertson's (Albertson) separate and distinct motion, Appellants directed and focused the district court on the fact that *Bankston's* holding finally made clear that Royal could not manufacture diversity by failing to sue the unincorporated association/partnership; thereby avoiding the required "counting" of the citizenship of each individual unincorporated association member/general partner. (App'ts Rec. Excerpts "J," "O" Ex. 2 & "Q"; R.3656-3725, 3746-67, 3769-85 [Vol. 16]); *see also Id.*

also Navarro Sav. Ass'n. 446 U.S. at 461) (limited partnership association, no more than "mere collection of individuals"); *Assoc. Students of Univ. of CA. v. Kleindienst,* 60 F.R.D. 65, 67 (C.D. Cal. 1973) (unincorporated association," . . . voluntary group of person, without [c]harter formed by mutual consent for [p]urpose of promoting [c]ommon enterprise or prosecuting [c]ommon objective . . . "); *Hutchins v. Grace Tabernacle United Pentecostal Church,* 804 S.W.2d 598, 599 (Tex.App. – Houston [1st Dist.] 1991, no writ) (unincorporated association, voluntary group of persons formed by mutual consent for purpose of promoting common enterprise); *see also cf. Holberg & Co. v. Citizens Nat'l Assur. Co.,* 856 S.W.2d 515, 517 (Tex.App. – Houston [1st Dist.] 1993, no writ) (in suit against unincorporated association, any judgment rendered against association is conclusive as to its members) (citing *Cox,* 836 S.W.2d at 169, for proposition that unincorporated association has no existence apart from individual members); *The American Heritage Dictionary of the English Language* 706 ("jointly," meaning "formed or characterized by cooperation or united action"). Royal's editorialization falls far short of the undermining conclusive evidence.

Royal's procedural manipulation of the parties, unappreciated not only by Appellants, but, as well, the district court, this Court, and the United States Supreme Court, resulted in Royal's improper invocation of federal jurisdiction on some claims which, in turn, allowed them to secure a final judgment on those claims against the

wrong parties.[8] That is, while Royal calculatingly never sued the real party to the controversy (because, to have done so would have destroyed federal diversity jurisdiction), they nonetheless influenced the district court to: (a) expand its federal jurisdiction beyond that permitted by congressional mandate; and (b) permanently enjoin the unincorporated association/partnership (not a party) from pursuing its rightful state tort claims. Thus, by their impermissible manipulation of the parties, Royal finagled a permanent injunction against all of the unincorporation association members without ever having sued the entity.

Royal sued less than all the unincorporated association's members in order to avoid jurisdictional problems and remain in federal court so that they could secure injunctive relief by "grabbing" the *diverse* investors who, allegedly, were in privity with the association and the Quinn-L Defendants.[9] *Bankston's* decision, however,

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[8] Or, put another way, by suing the "wrong" party (less than all 157 associated members), Royal has indirectly secured a permanent injunction against the "right" party, the only and sole owner of the rights which Royal sought to impact, the unincorporated association/partnership.

[9] *But see generally Harris Trust & Sav. Bank v. Energy Assets Int'l Corp.*, 124 F.R.D. 115, 117 (E.D. La. 1989) ("virtual representation," an exception to *res judicata* "mutuality requirement" which, under narrow circumstances, binds a nonparty to court's order); *Matthies v. Seymour Mfg. Co.*, 270 F.2d 365, 371 (2d Cir. 1959), *cert. denied*, 361 U.S. 962 (1960) (application or not of "virtual representation" doctrine depends upon whether all or any of a group's members are presently ascertainable) (if membership proves undeterminable, the group, if at all, could participate only through virtual representation) (but, court may not use doctrine to justify absence of parties of an already ascertained status). Here, every

finally made apparent that such manipulation was absolutely improper; that is, Royal could not manufacture federal diversity jurisdiction by avoiding suit against the real party to the controversy via dismissal of a non-diverse member. *Bankston*, 27 F.3d at 167-68.[10]

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associated member was known by Royal and the district court since September 1990. Further Royal has consistently taken the position that the Investors were collectively pursuing the assigned claims. Thus, Royal has not been misled to think that the Investors owned their own respective "pieces of action" separate from the group. (App't Rec. Excerpts II "Y", p. 13 [according to Royal, the district court had before it the Quinn-L Defendants and 156 diverse Investors, all of whom possessed the same interest in a determination of coverage as did PIP Partners]; R. Appendix to Plaintiffs' Memorandum in Opposition to Rule 60b(5) Motion, bates-stamped "96-10078" /"under separate cover" at Ex. 9).

[10] So as to highlight Royal's manipulation, Appellants would use the following illustration: The 157 individual Investors comprised the unincorporated association/partnership. However, for argument's sake, the Court should assume that 146 of them were citizens of the same state(s) as Royal. Yet, in this example, Royal chose to sue only the ten (10) diverse Investors in order to improperly manufacture diversity. By no stretch of the imagination, could ten diverse members out of the 157 total, have constituted the unincorporated association/partnership. Why? Because the ten members, out of 157, did not own the rights which Royal had sought to attack. Instead, the unincorporated association, or all 157 members, jointly owned the effected rights. Thus, suing and securing a judgment against less than all members would not, and could not, have bound the unincorporated association, comprised of all 157 members. Although perhaps not as obvious, this same axiom holds true herein; that is, by dismissing the nondiverse association member (PIP Partners), Royal failed to sue the owner of the effected rights, the unincorporated association/partnership. *See generally Rhulen Agency, Inc. v. Alabama Ins.*

Royal, as Plaintiff, chose to join all the unincorporated association/partnership members as individual party defendants in *Royal II;* later, dismissing the nondiverse association member, PIP Partners. (App'ts Rec. Excerpts II "V", pp. 1-3, "W" Ex. A, "Y"; R. "A-9" Ex. 100, Appendix to Plaintiffs' Memorandum in Opposition to Rule 60b(5) Motion, bates-stamped "96-10078"/"under separate cover" at Exs. 5 & 9).[11] Thus, Royal necessarily adopted the notion that the unincorporated association was a group of individuals voluntarily linked in a matter which created common rights and liabilities. *See* 7C

Guar. Ass'n. 715 F.Supp. 94, 98 (S.D.N.Y.1989) *aff'd,* 896 F.2d 674 (2d Cir. 1990) (there, court would not permit plaintiff to sue unincorporated association in diversity simply by proceeding against all of the individual members except those nondiverse to plaintiff) (to do so would permit diversity litigation against unincorporated associations which had only a single diverse member, by suing that member to bring all the rest before the court by a third-party action for contribution/indemnity) ("Even the most fervent supporter of diversity jurisdiction would find it hard to swallow such artificial procedure"); *Ware v. Jolly Roger Rides, Inc.,* 857 F.Supp. 462, 464 (D. Md. 1994) (plaintiff may not defeat complete diversity requirement by suing only those diverse defendants and waiting for them to implead nondiverse defendants) (citing *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365 (1978)).

[11] Under Texas law, Royal could have sued the "entity," because it has jural capacity. *See* Tex. Rev. Civ. Stat. Ann. art. 6133 (Vernon 1970). However, Royal chose not to do so; instead, joining all 157 associated members as party-defendants. That decision triggered significant ramifications effecting the district court's diversity jurisdiction, because an unincorporated association has no citizenship of its own. *See* 7C *Charles A. Wright & Arthur R. Miller,* Fed.Prac & Proc. 2d § 1861, at 214-15, 217-18 (1984).

Wright & Miller, supra note 11, at 214. Since, for diversity purposes, the unincorporated association had no citizenship of its own, its citizenship was deemed that of each of its members. *7C Wright & Miller, supra* note 11, at 217-18 (*e.g., Lowry v. Int'l Brotherhood of Boilermakers of Iron Shipbuilders & Helpers of Am.*, 259 F.2d 568, 570-73 (5th Cir. 1958)). As such, complete diversity of each associated Investor (including PIP Partners) was required. *See Carden*, 494 U.S. at 190 (citizenship of all unincorporated association members taken into consideration in determining diversity jurisdiction); *Elliott v. Tilton*, 62 F.3d 725, 727 (5th Cir. 1995), *on reh'g remanded*, 69 F.3d 35, 36 (5th Cir. 1995).

V. *U.S. v. Georgia Power Company* Permits Relief Under Fed. R. Civ. P. 60b(5) When a Significant Modification in Decisional Law Has Occurred

Appellants need not have experienced any *per se* after judgment "change in circumstances" to secure relief under Fed. R. Civ. P. 60b(5). Instead, in the Fifth Circuit, a significant modification in decisional law permits the prospective modification of a permanent injunction when it would no longer be equitable for that judgment to have prospective application. *U.S. v. Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 952 (1982) (in the Fifth Circuit, significant modification in decisional law permits court to prospectively modify permanent injunction under Rule 60b(5) (citing *Sys. Fed'n No. 91, Ry. Employees' Dept. v. Wright*, 364 U.S. 642 (1961)) and *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), for proposition that Supreme Court has given "strong indications" that courts should modify injunction based

on change in case law); *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600 (5th Cir. 1980) (Rule 60b, as recognized by Fifth Circuit, "liberally construed to do substantial justice"); *Elgin Nat'l Watch Co. v. Barrett*, 213 F.2d 776, 780 & n.11 (5th Cir. 1954) (relief granted under Rule 60b(5) based upon new interpretation of fair trade act announced by Supreme Court three (3) years after injunction entered) (dissolution of injunction upheld on appeal as to prospective operation of permanent injunction) (citing *U.S. v. Swift & Co.*, 286 U.S. 106, 114 (1932), for proposition that injunction always subject to adaptation as events may shape need so that courts cannot disregard significant changes in law or fact if to do so would turn permanent injunction into "instrument of wrong");[12] *see also cf. King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) ("While changes in fact or law afford the clearest basis for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes").

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[12] Royal cited *Swift Chemical Co. v. Usamex Fertilizers, Inc.* 490 F.Supp. 1343, 1350 (E.D. La. 1980), *aff'd*, 646 F.2d 1121 (5th Cir. 1981), as alleged support for their contention that the Investors must, *arguendo*, have identified changed circumstances since entry of judgment to secure relief under Rule 60b(5). However, the holding of *Swift Chemical* dealt solely with the application of Fed. R. Civ. P. 60b(2) regarding the discovery of new evidence, not subsection (5).

VI. *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991), Offers No Support to Royal

A. *Freeport-McMoRan*, Facts Not Analogous

First, *Freeport-McMoRan* is not decisive, because Royal failed to sue the real party to the controversy, the unincorporated association/partnership. That is, Royal failed to sue the sole owner of the rights which it sought to effect via *Royal II*. *See Navarro Sav. Ass'n*. 446 U.S. at 451. Yet, Royal has secured a permanent injunction against that never-sued entity (unincorporated association/partnership) and enjoined the pursuit of some claims (post declaratory judgment torts) over which the district court never had any jurisdiction.

On the other hand, *Freeport-McMoRan* dealt with a simple Fed. R. Civ. P. 25(c) substitution of a party-plaintiff and whether that new plaintiff had a cognizable interest in the litigation at its inception. Because the transfer in interest to the substituted plaintiff had occurred after the suit's filing, the Supreme Court found that said party had no interest in the litigation's outcome until after commencement. Thus, the Court found that if complete diversity existed among the original parties upon the case's filing, the substitution or addition of a new nondiversive plaintiff to whom an interest in the original claims had been transferred after commencement, would not destroy diversity jurisdiction. *Id.* at 428; *see also James W. Moore, et al.*, Moore's Fed. Prac. § 74[1], at 156 (2d ed. Supp. 1995-96).

In reaching its decision in *Freeport-McMoRan*, the Supreme Court merely reiterated the well-established principle that, generally, a court assessed diversity of

citizenship at the time of an action's filing. *Id.* at 428. For example, once acquired, a subsequent change in the parties' citizenship will not divest the court of diversity jurisdiction. *Id; see also 13B Charles A. Wright & Arthur R. Miller,* Fed. Prac. & Proc. 2d § 3608, at 449 (1984 & Supp. 1996). Similarly, therefore, where the original plaintiff had transferred its interest in the contract at issue to a limited partnership (which included nondiverse partners) for business reasons unrelated to the litigation, the Supreme Court found that the district court had been correct in permitting the original plaintiff to amend its complaint and substitute the nondiverse limited partnership as a plaintiff under Fed. R. Civ. P. 25(c). *Id.* at 427.[13] Hence, in situations such as that as presented in *Freeport-McMoRan,* a change in parties by addition, substitution or elimination will, generally, not divest a court of diversity jurisdiction. Further, parties impleaded under Fed.R.Civ.P. 14 fall within a court's jurisdiction and whose joinder will not effect the original determination of complete diversity's existence. The same holds true for additional parties to compulsory counterclaims or cross-claims under Fed.R.Civ.P. 13b. *See generally 13B Wright & Miller, supra* at 453.

On the other hand, if there is a change in party by addition, substitution or elimination, the court will be divested of diversity jurisdiction if: (a) the nature of the action does not remain the same; (b) the court finds collusion (jurisdictional) involved; or (c) the change in

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[13] Apparently, the district court in *Freeport-McMoRan, Inc.* permitted the limited partnership's substitution, although it never formally removed the original plaintiff as a party. *Id.*

parties is an obvious attempt to evade the rule of complete diversity. *See 13B Wright & Miller, supra* at 453-54. Finally, parties joined under Fed. R. Civ. P. 19 and 20, or as additional parties to a permissive counterclaim, must independently satisfy diversity jurisdictional requirements. *See 13B Wright & Miller, supra* at 454. Parties are not permitted to use Rules 19 and 20 to artificially create jurisdiction by bringing in nondiverse parties after the initial complaint has been filed and thereby undermine the rule of complete diversity and improperly expand the federal court's jurisdiction. *See 13B Wright & Miller, supra* at 354.

Here, as shown below, when Royal moved to supplement their first amended original petition for declaratory relief, they not only joined 157 new defendants (thus, initially suing the real party to the controversy), but, as well, radically altered the nature of their original action (to enforce *Royal I*) against only the Quinn-L Defendants. *See supra* at 19. Royal, once realizing that their joinder of the unincorporated association had divested the district court of diversity jurisdiction, quickly (and improperly) dismissed the nondiverse associated member, PIP Partners. Royal's action was an evasion of the rule of complete diversity, resulting in: (a) an improper expansion of the district court's limited jurisdiction; and (b) a permanent injunction's entry against the sole owner of the effected rights when that entity was not sued by Royal. *See generally Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806).

B. In *Freeport-McMoRan*, the Supreme Court Expressly Approved the Continuing Efficacy of *Owen Equip. & Erection*

In *Freeport-McMoRan*, the respondent had relied upon *Owen Equip. & Erection*, 437 U.S. 365, to support the Tenth Circuit's ultimately reversed result; *i.e.*, that although complete diversity had existed upon the complaint's filing, the limited partnership's substitution had destroyed jurisdiction.[14] *Freeport-McMoRan*, 498 U.S. at 427-28. In *Owen Equip. & Erection.*, on the other hand, the Supreme Court had held that in an action based upon diversity of citizenship, any claim asserted by the original plaintiff against a third-party defendant must have possessed an independent jurisdictional basis. *Owen Equip. & Erection*, 457 U.S. at 374. As the situation in *Freeport-McMoRan* involved the mere substitution of parties under Fed.R.Civ.P. 25(c), *Owen Equip. & Erection* "cast no doubt" on the general principle that a court assesses diversity jurisdiction upon the lawsuit's commencement. *Freeport-McMoRan*, 498 U.S. at 428.[15]

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[14] The Tenth Circuit had relied upon *Carden*, 494 U.S. 185; finding that as the nondiverse limited partnership had become the real party in interest (*i.e.*, under Rule 17(a), applying only to plaintiffs), its presence allegedly destroyed diversity. Rejecting the Tenth Circuit's analysis, the Supreme Court held that the original *Carden* plaintiff was the limited partnership. Thus, diversity jurisdiction depended upon whether complete diversity existed at the time of the action's commencement. *Id.* at 427-28.

[15] In *Owen Equip. & Erection Co.*, 437 U.S. 365, the Supreme Court specifically held that a district court's ancillary jurisdiction did not extend to an original plaintiff in a diversity action who sought to also sue a nondiverse third-party

Thus, a superficial reading of *Freeport-McMoRan*, might lead one to incorrectly assume that the existence of federal diversity jurisdiction depends simply upon indispensability or dispensability. However, as shown above, the issue is not that limited; especially, as federal courts are courts of limited jurisdiction and may exercise only the authority granted to them by Congress. *See Casas Office Machines v. Mita Copystar Am., Inc.*, 42 F.3d 668, 674 (1st Cir. 1994) (citing *Owen Equip. & Erection*, 437 U.S. at 374, for proposition that, " . . . [t]he limits upon federal jurisdiction, whether imposed by the Constitution or the Congress, must be neither disregarded nor evaded"). Thus, specific legislative directives override the general principle reaffirmed in, for example, *Freeport-McMoRan. Id.*[16] Under *Owen Equip. & Erection*, parties who chose a

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defendant impleaded by an original defendant under Fed. R. Civ. P. 14(a).

[16] *See, e.g.*, 28 U.S.C. § 1367(b) (enacted December 1990 and applying to cases filed therafter), whereby Congress, using "supplemental jurisdiction" to, in part, mean "ancillary jurisdiction," specifically forbid a plaintiff to add defendants under Rule 19 when to do so would be inconsistent with Section 1332's stringent jurisdictional requirements; thus, confirming-case made restrictions on ancillary jurisdiction. *See In re Tex. Eastern Trans. PCB Contamination Lit.*, 15 F.3d 1230, 1237-38 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 291 (1994) (in *Owen Equip. & Erection*, the Supreme Court, " . . . carefully distinguished a non-federal claim asserted by a *plaintiff* which could be joined with a federal cause of action arising from the same transaction despite its destruction of complete diversity, from ancillary jurisdiction, which typically involves 'claims by a defending party hailed into court against his will . . . ' ") ("ancillary jurisdiction" pertains to claims other than those brought by plaintiffs) (Section 1367(b) thus codified the restrictions against the extension of jurisdiction in diversity cases over "claims by

federal rather than a state forum to assert state law claims (like Royal) may not use ancillary jurisdiction (not possessed by the district court herein) to circumvent complete diversity requirements. *MCI Telecommunications*, 848 F.Supp. at 88 (citing *Owen Equip. & Erection*, 437 U.S. at 376-77).

Here, Royal chose the federal forum to assert purely state law claims. Further, this Court found that the district court did not have ancillary jurisdiction over the post-declaratory judgment torts committed by Royal. See *Royal Ins. Co. of Am.*, 3 F.3d at 881. Thus, by manipulating the parties and manufacturing diversity jurisdiction, Royal misled the district court to: (a) disregard and evade the stringent limits on federal jurisdiction; and (b) enter a permanent injunction against the unincorporated association which, although the only real party to the controversy, had never been sued by Royal. The Supreme Court's holding in *Freeport-McMoRan*, does not eliminate this firmly established tenet of American constitutional jurisprudence; especially, considering the Court's continuing, express recognition of *Owen Equip. & Erection*.

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plaintiffs against persons made parties under Rules 14, 19, 20, or 24 . . . ") (emphasis added); *MCI Telecommunications v. Logan Group*, 848 F.Supp. 86, 87-89 (N.D. Tex. 1994) (only after diversity jurisdiction is found on primary claim does court examine other of plaintiff's claims to determine if supported by ancillary (now supplemental) jurisdiction or by independent jurisdictional basis) (traditionally, ancillary jurisdiction exercised when original claims supported solely by diversity jurisdiction, to adjudicate related state-law claims by defending party hailed into court against his will) (citing *Owen Equip. & Erection*, 437 U.S. at 376).

Freeport-McMoRan, 493 U.S. at 428; *see also Chase Manhattan Bank, NA v. Aldridge*, 906 F.Supp. 866, 869 (S.D.N.Y. 1995) (as held by *Owen Equip. & Erection*, a plaintiff cannot complain if ancillary jurisdiction does not encompass all of possible claims since it chose the federal rather than state forum) (plaintiff must therefore accept federal forum's limitations); *Duke & Benedict, Inc. v. Wolstein*, 826 F.Supp. 1413, 1416 (M.D. Fla. 1993) (House Report Statement emphasized Section 1367's purpose was to prevent district courts from hearing plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage them to evade jurisdictional requirements under Section 1332 by the "simple expedient of naming initially only those defendants whose joinder satisfie[d] Section 1332's requirements and later adding claims not within original jurisdiction against other defendants who have . . . [b]een joined on a supplemental basis"); *Casas Office Machines*, 42 F.3d at 674 n.7 (thus, where Congress has expressly provided, the addition of nondiverse, dispensable parties will nonetheless defeat diversity jurisdiction even if such jurisdiction has already been established at the start of the federal proceeding)[17]

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[17] Indeed, if the Supreme Court in *Freeport-McMoRan is, arguendo*, interpreted otherwise, it would have defied Congress' express dictates set forth at 28 U.S.C. § 1367(b) and which, in essence, codified the Supreme Court's 1978 decision in *Owen Equipment & Erection*, 437 U.S. at 376-77.

C. *Carlton v. BAWW, Inc.*, 751 F.2d 781 (5th Cir. 1985), Remains "Good Law"

The Fifth Circuit in *Carlton*, 751 F.2d 781, also generally held that a court determines diversity at the suit's commencement, not upon subsequent events. *Id.* at 785. Indeed, the Fifth Circuit expressly refused to limit this principle to cases involving existing plaintiffs or defendants who change domicile after the lawsuit's commencement. Instead, following precedent, the Fifth Circuit included circumstances where nondiverse parties, joined after commencement, did not destroy jurisdiction, such as: (a) Rule 14 impleaders of nondiverse third-party defendants under ancillary jurisdiction; (b) Rule 25 substitutions of nondiverse representatives; and (c) Rule 24(a) interventions as of right by one other than a Rule 19(b) indispensable party. *Id; see also 13B Wright & Miller,* supra at 453.

However, the Fifth Circuit also expressly recognized that a district court must reassess jurisdiction at the time of an amendment to the pleadings which: (a) alters the nature of the action; or (b) adds a party without whom the case cannot continue. *Carlton*, 751 F.2d at 785, *accord 13B Wright & Miller, supra* at 453; *Zurn Indus., Inc. v. Acton Const. Co., Inc.*, 847 F.2d 234, 237 (5th Cir. 1988) (citing facts of *Owen Equip. & Erection*, 437 U.S. 365, at example of circumstances where district court must reassess diversity jurisdiction at the time of amendment, because case's nature altered thereby); *New Bank of New England v. Tritek Communications*, 143 F.R.D. 13, 15 (D. Mass 1992) (while recognizing that, under *Freeport-McMoRan*, a partial amendment will generally not operate to nullify diversity

jurisdiction established at case's commencement, if amended complaint asserts different cause of action, district court must redetermine jurisdiction from superseding pleading) (citing *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985))[18]; *China Basin Properties, Ltd. v. Allendale Mut. Ins. Co.*, 818 F.Supp. 1301, 1303 (N.D. Cal. 1992) (if amended complaint joins new parties and alters nature of action, diversity must exist at that time). Here, by its supplemental pleading, Royal substantially altered the nature of their case, as follows.

Royal filed their original petition in *Royal II* on 9 March 1990 (App'ts Rec. Excerpts II "T"; R. "K-4" Ex. 1). Quinn-L were the sole Defendants, and Royal sought only to enforce *Royal I*. That is, Royal requested the Court only to declare that they had no duty to the Quinn-L Defendants to: (a) provide a defense in *Atkinson;* and (b) indemnify said Defendants for any losses arising out of the claims asserted in *Atkinson* under the relevant policies of insurance. *Id.*[19] On 12 June 1990, Royal filed its first amended original petition for declaratory judgment. (App'ts Rec. Excerpts II "U"; R. "A-8" Ex. 95). Royal's amended petition retained the same Defendants and causes of action as originally asserted, but made "cosmetic" changes to their original complaint such as setting forth more detailed jurisdictional allegations. (*Id.* at pp. 1-3).

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[18] *See also Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1227 (5th Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989) (under *Owen Equip. & Erection*, 437 U.S. 365, the addition of a nondiverse defendant may destroy complete diversity and defeat federal jurisdiction).

However, on 27 September 1990, Royal requested leave to file a supplemental (not amended) petition for declaratory judgment. (App'ts Rec. Excerpts II "V," "W" and "X"; R. "A-9" Ex. 100, Appendix to Plaintiffs' Memorandum in Opposition to Rule 60b(5) Motion, bates-stamped "96-10078"/"under separate cover" at Exs. 5 & 9). Royal sought to supplement their first amended original petition for declaratory judgment by: (a) joining all 157 Investors to *Royal II*, because as both assignees and judgment creditors, Royal had various, potential obligations to them; and (b) asserting wholly new and different claims against not only in the Investors, but, as well, the Quinn-L Defendants. (App'ts Rec. Excerpts II "V", "X," p.11; R. "A-9" Ex. 100, Appendix to Plaintiffs' Memorandum in Opposition to Rule 60b(5) Motion, bates-stamped "96-10078"/"under separate cover" at Ex. 9). In their supplemental pleading, Royal also retained the Quinn-L Defendants as separate parties to the action; that is, Royal did not merely substitute the Investors under Fed. R. Civ. P. 25(c). (App'ts Rec. Excerpts II "V"; R. "A-9" Ex. 100).

A supplemental complaint is distinguishable from an "amended complaint," because the latter, generally, corrects faults or errors in the already filed original complaint. On the other hand, a supplemental pleading is one consisting of facts arising since filing of the original complaint. *See* Fed. R. Civ. P. 15(d). Thus, Royal requested, for the first time by their supplemental petition, that: (a) they had no duty to indemnify the Quinn-L Defendants and no liability to the Quinn-L Defendants or the Investors for the *Atkinson* judgment; (b) as losses adjudged against the Quinn-L Defendants in favor of the Investors in *Atkinson* were (allegedly) not for occurrences covered

under the Quinn-L Defendants' relevant policies, Royal had no duty to indemnify the Quinn-L Defendants, and no liability to the Investors, for the *Atkinson* judgment; (c) as the Quinn-L Defendants (allegedly) failed to cooperate or provide a reasonable defense to the Investors' claims asserted in *Atkinson*, Royal had no obligation to the Quinn-L Defendants or the Investors; (d) as the *Atkinson* judgment was (allegedly) the result of collusion between the Quinn-L Defendants and the Investors,[20] Royal had no obligation to the Quinn-L Defendants or the Investors; and (e) should the federal court have found Royal to have possessed any such obligations to the Quinn-L Defendants and the Investors, then said duty would not have been determined by the *Atkinson* judgment, but, instead, Royal would have secured a declaration of the extent of any coverage or indemnity obligation from the federal court. Thus, by suing the unincorporated association. (via initially naming all 157 associated members as party-defendants) and alleging wholly separate and distinct causes of action, Royal greatly altered the nature of its original complaint for declaratory relief. Therefore, the district court was duty bound to have reassessed jurisdiction at the time of Royal's supplemental petition. *Carlton*, 751 F.2d at 785; *Zurn Indus., Inc.*, 847 F.2d at 237; *New*

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[20] This allegation could not have been true as it was solely the misconduct of defense counsel appointed by Royal in *Atkinson* that ultimately led to: (a) the state court's imposition of discovery sanctions; and (b) a judgment against the Quinn-L Defendants. (R. "A-5" Exs. 39, 43, p.3-4, 45 & 48; "A-7" Exs. 62 & 69; "A-8" Exs. 79 & 89; "A-11" Ex. 152; "C-7," pp. 31-32, 73, 146-147; "K-7" Ex. 4; R. Vol. 12 Ex. "B," pp. 6 & 10, "B-8" Ex. 48; Ex. "B-10," p. 7; R. 1275-76).

Bank of New England, 143 F.R.D. at 15; *China Basin Properties,* Ltd., 818 F.Supp. at 1303; *13B Wright & Miller, supra* at 453.

VII. Courts Have Consistently Recognized the Propriety of Using Rule 60b Motions to Directly Attack Subject Matter Jurisdiction Deficiencies

First, Royal makes much ado about Fed. R. Civ. P. 60b(4). This is a red herring. Appellants did not move for relief under Rule 60b(4), but, instead, 60b(5). Appellants did so, because they are not asserting that the judgment/permanent injunction is void, but only that part of it (as to the ability of the never-sued unincorporated associations and Quinn-L to pursue their Texas state actions for Royal's post-declaratory judgment torts) should be vacated and modified. Thus, Appellants have properly used Fed. Rule Civ. P. 60b(5) in order to directly attack Royal's manufacturing of diversity jurisdiction. *See Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 376 (1940) (subject matter determination, while not subject to collateral attack, always open to direct review); *Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't. v. Dole,* 948 F.2d 953, 956 (5th Cir. 1991); *Jordan v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975) (*res judicata,* no preclusion to direct attack under Rule 60b on judgment before rendering court); *Watts v. Pickney,* 752 F.2d 406, 410 (9th Cir. 1985) (*res judicata,* no preclusion to direct attack under Rule 60b for lack of jurisdiction) (direct attack on judgment, one between parties seeking to correct, annul, reverse, vacate or declare such judgment void). Therefore, as diversity

jurisdiction may not be waived, *Royal II* must be dismissed as to all matters beyond enforcing *Royal I*. *See Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (subject matter jurisdiction may not be waived, and district court "shall dismiss" action whenever it appears the Court lacks such jurisdiction) (*emphasis added*).

VIII. PIP Partners and Albertson Brought Their Motions Within a Reasonable Time

To begin, the 60b(5) motions of Albertson and PIP Partners were timely, because they constituted direct, permissible attacks on Royal's manufacturing of diversity jurisdiction. *See Chicot County Drainage Dist*, 308 U.S. at 376 (subject matter determination, while not subject to collateral attack, always open to direct review). Considering that Royal did not maintain suit against the real party to the controversy (the sole owner of the rights [i.e., post-judgment claims] which they sought to litigate), the prospective inequity of continuing a permanent injunction against the unincorporated association/partnership rendered the district court's denial of the PIP Partners/ Albertson Rule 60b(5) motions an abuse of discretion.

Equally important, Royal's improper manipulation went undetected not only by Appellants, but, as well, the district court, the Court of Appeals and the United States Supreme Court. However, the Supreme Court has made clear in *Carden*, 494 U.S. at 195-96, that the rule regarding diversity is inflexible and no court is relieved from the duty of ascertaining if the lower court had probably taken federal jurisdiction, in the first instance.

Further, Royal, which can claim no detriment for the injunction's issuance, bore the sole burden to sue the real party to the controversy. Royal and the district court were on express notice of the unincorporated association's existence, as well as the assignment's joint nature in September 1990. In this regard, the unincorporated association/partnership, which included PIP Partners and Albertson (associated members), had been detrimentally impacted by the injunction, but had no day in court. In effect, the injunction has resulted in an unconstitutional "taking." The unincorporated association/partnership (including its associated members, PIP Partners and Albertson), although never having been sued, is not late in seeking relief from an injunction which, nonetheless, has "taken" its rights. Without Royal suffering any detrimental reliance, they have no right to a continuing benefit from any order regarding some claims over which the trial court never had subject matter jurisdiction.

IX. Conclusion

This Circuit's decision in *Bankston*, 27 F.3d 164, finally made clear that Royal could not manipulate the parties and manufacture diversity jurisdiction. The Fifth Circuit did not render *Bankston* until July 1994, less than one year from the time of PIP Partners' 1995 motion.[21] (App'ts Rec. Excerpts "F"; R. 3551-634 [Vol. 16]). In closing, the real party to the controversy, the unincorporated association of Investors has yet to be sued; although it has, by *privity*,

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[21] Moreover, the Fifth Circuit's opinion was not published until several months thereafter.

been permanently enjoined. Thus, no circumstance justifies continuing the injunction or assigning any affect on legal rights (as to Royal's post-declaratory judgment torts) by a federal district court which never had subject matter or personal jurisdiction over the unincorporated association/partnership.

Respectfully submitted,

BOYD & ASSOCIATES

/s/ Samuel L. Boyd, P.C.
Samuel L. Boyd, P.C.
State Bar No. 02777500
Priscilla E. Perry
State Bar No. 15803700

13355 Noel Road, LB 87
One Galleria Tower, 21st Floor
Dallas, Texas, 75240-6602
(214) 726-0204
(214) 726-0208 (FAX)

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing matter has been served upon counsel for Appellees, on this **12th day of July, 1996.**

/s/ Samuel L. Boyd, P.C.
Samuel L. Boyd, P.C.

APPENDIX G – AFFIDAVIT OF G. LEE CRANFILL FILED IN CIVIL ACTION NO. CA3-90-0550-C IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION DATED SEPTEMBER 27, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROYAL INSURANCE COMPANY OF AMERICA, ET AL.	§	CIVIL ACTION NO. CA3-90-0550-C
vs.	§	
QUINN-L CAPITAL CORPORATION, ET AL.	§	

AFFIDAVIT OF G. LEE CRANFILL

STATE OF TEXAS §
§
COUNTY OF MOORE §

G. Leo Cranfill, first being duly sworn, deposes upon his oath and says as follows:

1. My name is G. Lee Cranfill, I am over 21 years of age, have never been convicted of a felony and am competent to make this Affidavit which I do upon my own personal knowledge.

2. I am the managing partner, and I am also a general partner of Professional Investors Partnership II, a general partnership organized under the laws of the state of Texas on April 1, 1982. A true and correct copy of the

General Partnership Agreement of Professional Investors Partnership II is attached hereto as Exhibit "A" and by reference incorporated herein.

3. Three of the other general partners of Professional Investors Partnership II are Richard B. Myers, J. Daniel Subtelny, and Anthony W. Gargiulo.

4. On October 2, 1984, Professional Investors Partnership II became a limited partner in the Nashville Second Avenue Partners 1984, limited partnership whose General Partner was Quinn-L Investments, Inc., a Louisiana Corporation.

5. Professional investors Partnership II was a Plaintiff in Dallas County District Court Cause No. 89-11030-M, entitled *Mike Allen Adkission, et al. v. Quinn-L Capital Corporation, et al.*, and is, at this time, a judgement creditor of Defendants Quinn-L Capital Corporation, Quinn-L Equities, Inc., Quinn-L Financial Corporation, Quinn-L Management Corporation and Quinn-L Mortgage Company ("Quinn-L Defendants"). Additionally, Professional Investors Partnership II, by written contract, is an assignee, jointly, with all of the other Plaintiffs in Cause No. 89-11030-M, of all of the rights of the Quinn-L Defendants against the Petitioners, other members of the Royal Insurance Group of companies and their agents.

6. From, and after, 1982, when he purchased his interest in Professional Investors Partnership II until today, Richard B. Myers has been a resident of Oneida, New York, and he is presently a citizen of New York.

7. From, and after, 1982, when he purchased his interest in Professional Investors Partnership II until

today, J. Daniel Subtelny, has been a resident of Pittsford, New York, and, he is presently a citizen of New York.

8. From, and after, 1982, when he purchased his interest in Professional Investors Partnership II until today, Anthony W. Gargiulo has been a resident of Chicago, Illinois, and he is presently a citizen of Illinois.

Further Affiant sayeth not.

[SEAL]

/s/ G. Lee Cranfill
G. LEE CRANFILL

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this 27th day of Sept., 1990.

/s/ Sharen Baker
Notary Public in and for the
State of Texas

My Commission Expires:

4/15/91